

Dobrich, et al.  
Charles M. Bireley

v.  
C.A. # 15-120 (JJF)

Indian River School District, et al.  
October 11, 2006

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1 IN THE UNITED STATES DISTRICT COURT  
2 IN AND FOR THE DISTRICT OF DELAWARE

3  
4 MONA DOBRICH and MARCO DOBRICH, individually and  
As parents and next friend of ALEXANDER DOBRICH,  
5 SAMANTHA DOBRICH, JANE DOE and JOHN DOE,  
individually and as parents and next friend of  
6 JORDAN DOE and JAMIE DOE,  
7 Plaintiffs

vs.

CIVIL ACTION  
NO. 15-120

8  
9 INDIAN RIVER SCHOOL DISTRICT, ET AL.,  
10  
11 Defendants

11

12

13

DEPOSITION OF CHARLES M. BIRELEY, taken  
14 pursuant to notice at the Indian Ricer School  
District, 31 Hosier Street, Selbyville, Delaware,  
15 beginning at 9:15 a.m. on October 11, 2006 before  
David A. Sroka, Registered Professional Reporter and  
16 Notary Public.

17

APPEARANCES:

18

THOMAS ALLINGHAM, ESQUIRE  
19 RICHARD HORVATH, ESQUIRE  
BRIAN LENHARD, ESQUIRE  
20 P.O. Box 636  
Wilmington, Delaware 19899-0636  
21 For the Plaintiffs  
22

22

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JASON P. GOSSELIN, ESQUIRE  
Drinker Biddle & Reath LLP  
Philadelphia, Pennsylvania 19103-6996  
For the Defendants

CHARLES BIRELEY,  
The Witness herein, called for examination by  
the Plaintiffs, having been duly sworn to tell the  
truth, the whole truth, and nothing but the truth,  
was examined and testified as follows:  
examination by him to.  
EXAMINATION BY MR. ALLINGHAM:  
Q. Good morning, Mr. Bireley, my name is Tom  
Allingham, I represent the Plaintiffs. I'm going to  
ask you questions today that are relevant in our  
view to the School Board prayer issue in this  
litigation.  
We have, as your lawyer has probably told  
you separated, or the judge has asked us to separate  
the School Board prior issue from the several other  
issues in the case, and so the deposition today will  
be focused on the School Board prayer issue.  
A couple pieces of introduction. I'm going  
to refer to the final board policy on School Board  
prayer, a copy of which I'll give you later and we  
will talk about it, as the School Board Prayer  
Policy. Do you understand what I mean when I say  
that?  
**A. Yes.**

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MS. DUPHILY: This is the  
videotape deposition of Mr. Charles  
Bireley, taken by the Plaintiffs in the  
matter of Dobrich, et.al, versus Indian  
River School District, et.al, case  
number is 15-120.

The deposition is being held at 31  
Hosier Boulevard, Selbyville, Delaware. We  
are going on the record on October 11, 2006  
at approximately 9:15 a.m.. The court  
reporter is Dave Sroka from the firm of  
Wilcox & Fetzer. I am Lindsay duPhily,  
videotape specialist from Discovery Video  
Services.

Now, the counsel will introduce  
themselves and then the court reporter will  
swear in the witness.

MR. ALLINGHAM: Tom Allingham  
representing the Plaintiffs and with me is  
Rick Horvath and Brian Lenhard.

MR. GOSSELIN: Jason Gosselin  
representing the Indian River School  
District, the school board and the other  
defendants.

Q. So, just some preliminaries. Ms. duPhily  
told you that we are going to take a break every  
hour. If you want to take a break at any other time  
just speak up and we can do that. There is no  
reason why we can't stop the tape and take a break  
if you need to?  
**A. Okay.**  
Q. Have you ever been deposed before?  
**A. Yes.**  
Q. In what context?  
**A. For the district.**  
Q. When did that take place?  
**A. Approximately four or five years ago.**  
Q. And what was the subject matter of the  
deposition?  
**A. A person in the community brought a lawsuit  
against one of our administrators.**  
Q. Did the case go to trial?  
**A. I don't think so.**  
Q. You did not testify at trial?  
**A. No.**  
Q. The last preliminary and you've probably  
been told this as well, if you don't understand the  
question that I ask you don't answer it, tell me you

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1 don't understand it and I will try to do better and  
2 ask a question that you do understand. If you  
3 answer the question without reservations I think  
4 that the jury and the judge will believe that you  
5 understood the question. So, let me know if you  
6 think the question is unclear or ambiguous.  
7 Mr. Bireley, you've been designated a  
8 something called a 30(b)(6) designee for the  
9 district on certain topics, and what I'd like to do  
10 is designate the first portion of this deposition as  
11 the Plaintiff's 30(b)(6) deposition on those topics.  
12 Do we have the 30(b)(6) notice and the response?  
13 I'll mark the topics themselves in a few  
14 minutes, but for the time being let's just go  
15 forward with that portion of the deposition, you are  
16 currently a member of the Board of Education of the  
17 Indian River School District?  
18 **A. Yes.**  
19 Q. How long have you served in that capacity  
20 thigh?  
21 **A. There is my 30th year.**  
22 Q. When were you first elected?  
23 **A. 1977.**  
24 Q. And as I understand it there was a short

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1 period in the middle when you were not a member of  
2 the Board?  
3 **A. Yes.**  
4 Q. Was that because you didn't run?  
5 **A. I was defeated.**  
6 Q. That was a two years hiatus?  
7 **A. Three.**  
8 Q. You are currently president of the Board?  
9 **A. Yup.**  
10 Q. What are the duties of the president in  
11 addition to a regular member of the Board?  
12 **A. To conduct the meetings, the monthly**  
13 **meeting and any special meetings that we have.**  
14 Q. Do you have any day-to-day contact with the  
15 individual schools within the district?  
16 **A. More from central office than any**  
17 **individual school building. I rarely talk to a**  
18 **school building.**  
19 Q. All right, and in your capacity as a Board  
20 member do you speak to individual students other  
21 than at Board meetings?  
22 **A. Yes.**  
23 Q. When do you have occasion to speak to  
24 individual student in the district?

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1 **A. Went I do?**  
2 Q. Yes?  
3 **A. Most of the time it's at athletic events.**  
4 Q. Talking about the athletic events?  
5 **A. Yes.**  
6 Q. Any other context in which you talk to  
7 individual district students?  
8 **A. If there is something going on in an**  
9 **individual building then I would. You know, some**  
10 **type of get together. We have dinners, you know**  
11 **academic achievement banquets, you know, things like**  
12 **that then I would see students.**  
13 Q. How many students are there in the  
14 district?  
15 **A. A little over 8000.**  
16 Q. You have been a Board member a long time,  
17 can you summarize what I believe for me what you  
18 believe are the principle areas of responsibility of  
19 the School Board?  
20 **A. Principle responsibilities?**  
21 Q. Yes.  
22 **A. I guess to make sure that the district is**  
23 **running certainly accordingly to law, make sure that**  
24 **our bills are paid on time, that we have enough**

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1 **money to pay the bills and conduct the meetings.**  
2 Q. Do your duties also include enforcement of  
3 the school attendance?  
4 **A. No.**  
5 Q. Do your duties include the grading and  
6 standardization of all schools in the district?  
7 **A. I'm not sure I understand that. What do**  
8 **you mean by the grading?**  
9 Q. Do you have an obligation to evaluate the  
10 performance of the schools in the district?  
11 **A. No.**  
12 Q. Do you have an obligation to standardize  
13 all schools in the district?  
14 **A. No.**  
15 Q. Is it within the Board's responsibility to  
16 adopt courses of study or curriculum?  
17 **A. Yes.**  
18 Q. Is it within the Board's responsibility to  
19 select, purchase and distribute text books and other  
20 materials?  
21 **A. Yes.**  
22 Q. How about to provide forms for school  
23 employees to make reports to the Board?  
24 **A. No.**

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1 Q. Is it the Board's responsibility to make  
2 the reports required by the State Superintendent of  
3 Public Instruction?  
4 A. Yes.  
5 Q. And is it the Board's responsibility to  
6 appoint personnel for the district?  
7 A. Yes.  
8 Q. Including teachers?  
9 A. Yes.  
10 Q. I asked you a question about text books,  
11 does the Board decide which text books to buy?  
12 A. Yes.  
13 Q. Does the Board approve the use of district  
14 facilities?  
15 A. Yes.  
16 Q. For example for people in the community who  
17 want to use a district building?  
18 A. Yes.  
19 Q. Does the School Board approve school use  
20 applications?  
21 A. Only if it's on a Sunday.  
22 Q. Can you describe for me what you mean by  
23 that?  
24 A. If someone in the community wants to use

1 that's how it goes, the process goes.  
2 Q. And so that our record is clear, when you  
3 refer to Sunday as being a day of rest you are  
4 referring to the fact that Sunday is the Sabbath  
5 Day --  
6 A. Yes.  
7 Q. -- under most Christian religions?  
8 MR. GOSSELIN: Objection.  
9 Q. I had this problem with Dr. Hattier  
10 yesterday, it must be that I speak too slowly, but  
11 you need to wait until my question is finished  
12 before you answer it because he can't get both of  
13 us.  
14 A. Okay.  
15 Q. Is the School Board involved in determining  
16 the punishment for student who violate the  
17 district's code of conduct?  
18 A. Yes.  
19 Q. And there are punishments, are there this  
20 not, levels of punishment which can't be imposed  
21 unless the School Board authorizes it?  
22 A. Yes.  
23 Q. Those would include expulsion and  
24 suspension?

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1 one of our buildings that's handled by the building  
2 principal unless it's on a Sunday, and then if it's  
3 a Sunday it has to have Board approval.  
4 Q. Why is that?  
5 A. That's our rules.  
6 Q. What was the reason for distinguishing  
7 Saturdays from Sundays in the treatment of who has  
8 to decide a school use application?  
9 A. It's been that way ever since I've been a  
10 Board member.  
11 Q. So, you don't have any idea why there is a  
12 distinction between Saturday and Sunday?  
13 A. I have an opinion.  
14 Q. What's your opinion?  
15 A. Sunday's a day of rest.  
16 Q. So that school use application on a Sunday  
17 -- I'm stating it as a statement, so let me ask you  
18 a question. Is it your opinion that the question of  
19 school use applications on Sunday is reserved for  
20 the Board because that's a more important question  
21 than the school use applications on Saturday in  
22 light of the fact that Sunday is a day of rest?  
23 A. No, I'd say it's just that's the way it's  
24 always been ever since I've been a Board member,

1 A. Yeah.  
2 Q. Do you know whether students are entitled  
3 tight to speak to the Board directly in connection  
4 with disciplinary actions against them?  
5 A. Are they entitled to?  
6 Q. Yes?  
7 A. There's a process for that.  
8 Q. Which permits them to speak directly to the  
9 Board?  
10 A. Yes.  
11 Q. Are you aware of instances in which a  
12 student has spoken directly to the Board?  
13 A. Yes.  
14 Q. Can you estimate for me over the course of  
15 your 30 years how frequently that's occurred?  
16 A. Very few.  
17 Q. The Schools Board's responsibilities  
18 include adopting the district's annual budget, is  
19 that correct?  
20 A. Yes.  
21 Q. I asked you about hiring teachers, is the  
22 School Board also responsible for firing teachers?  
23 A. Yes.  
24 Q. And also firing district employees?

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1 **A. Yes.**  
2 Q. Is the School Board involved in any way in  
3 determining the punishment for teachers who violate  
4 district policies?  
5 **A. Yes.**  
6 Q. Would you describe for me the process  
7 involved in that determination?  
8 **A. It usually comes through the superintendent**  
9 **as a recommendation.**  
10 Q. And the Board would then adopt the  
11 recommendation or amend it?  
12 **A. Based on the recommendation of the**  
13 **superintendent we would listen to that and make a**  
14 **decision.**  
15 Q. The School Board in Indian River also  
16 approves field trips at its meetings, is that right?  
17 **A. Yes.**  
18 Q. Why is that?  
19 **A. That's our policy.**  
20 Q. Do you have any idea what the reason is for  
21 that policy?  
22 **A. We would like to know whether or not what**  
23 **trips people go on.**  
24 Q. Does it involve determinations about the

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1 safety of the trips that are being proposed?  
2 **A. Yes.**  
3 Q. So, the welfare of the students is one  
4 aspect of the responsibility of the School Board?  
5 **A. Yes.**  
6 Q. At its meetings is it correct that the  
7 School Board gives students awards?  
8 **A. Yes.**  
9 Q. And in addition to direct awards it also  
10 gives students recognition for awards that the  
11 students have won in a wide variety of activities  
12 relating to their status as students?  
13 **A. Yes.**  
14 Q. You've been a Board member for 30 years,  
15 has the amount of time spent at individual Board  
16 meetings that is devoted to student recognition and  
17 student awards changed over time?  
18 **A. Yes.**  
19 Q. Can you tell me how it changed?  
20 **A. When I first was a Board member we didn't**  
21 **do it. It's something that's be added maybe within**  
22 **the last ten years.**  
23 Q. So mid '90s?  
24 **A. Yes.**

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1 Q. Is it the case that prior to that change in  
2 the mid '90s it was rare for a student to be in  
3 attendance at Board meetings?  
4 **A. I would say yes.**  
5 Q. And is it the case that since that change  
6 in the mid '90s it is the case that students  
7 regularly attend Board meetings?  
8 **A. Pretty much.**  
9 Q. Over the course of a given school year  
10 could you estimate for me on average how many  
11 student are in attendance at a Board meeting? A  
12 couple of dozen?  
13 **A. Not every meeting.**  
14 Q. Well, there are meetings when there are 50  
15 students, correct?  
16 **A. Yes.**  
17 Q. And but some meetings where there are very  
18 few?  
19 **A. Yes.**  
20 Q. That's why I said on average maybe a couple  
21 of dozen over the course of the school year?  
22 **A. Okay.**  
23 Q. The School Board approves construction  
24 projects?

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1 **A. Yes.**  
2 Q. The School Board also monitors the progress  
3 of construction projects -- is that right?  
4 **A. Yes.**  
5 Q. And does the School Board approve materials  
6 used for improvements in school facilities?  
7 **A. You mean during like renovations?**  
8 Q. Yeah.  
9 **A. No.**  
10 Q. Has the School Board, for example,  
11 considered and made a decision on what type of sod  
12 or grass seed to use on athletic fields?  
13 **A. Yes.**  
14 Q. Has the School Board made decisions on what  
15 type of carpet to use in a particular elementary  
16 school?  
17 **A. No.**  
18 Q. And all of these determinations and areas  
19 of responsibility that we have just discussed they  
20 are addressed by the Board at its public meetings,  
21 is that correct?  
22 **A. Yes.**  
23 Q. In your view is a decision on what textbook  
24 to buy for the district a legislative function?

5 (Pages 14 to 17)

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1 MR. GOSSELIN: Objection.  
2 Q. You can answer it. The way this works is I  
3 will probably ask lots of questions, that Mr.  
4 Gosselin thinks are objectionable. If he doesn't  
5 tell you not to answer, called instructing you not  
6 to answer, you can go ahead and answer the question.  
7 So, the question was, in your view is the  
8 decision about what textbook to buy for a district  
9 school or schools a legislative decision?  
10 **A. It's part of our process of what we are**  
11 **responsible for.**  
12 Q. Yes that's -- my question was is it a  
13 legislative decision?  
14 MR. GOSSELIN: Objection.  
15 **A. I really don't know how to answer the**  
16 **question.**  
17 Q. You have been quoted repeatedly in the  
18 newspaper as having said the Board is a legislative  
19 body, do you remember having given that quote to  
20 reporters?  
21 **A. Yes.**  
22 Q. What did you mean when you said the Board  
23 is a legislative body?  
24 **A. We've always been told that we are a**

1 **A. Not that I'm aware of.**  
2 Q. Or carpet for elementary schools?  
3 **A. Not that I'm aware of.**  
4 Q. Or hiring or firing decisions for district  
5 teachers?  
6 **A. No.**  
7 Q. Hiring and firing decisions for district  
8 employees?  
9 **A. No.**  
10 MR. GOSSELIN: Are these  
11 questions, I think maybe I should have  
12 asserted my form objection. Are you asking  
13 him questions about what the legislature in  
14 Delaware does or questions good what he  
15 does as a member of the School Board and  
16 School Board president?  
17 Q. I've already asked him what he does as a  
18 member of the School Board.  
19 MR. GOSSELIN: These are all  
20 questions, I apologize maybe I missed the  
21 beginning question there, but if are you  
22 asking him what he does or what the  
23 legislature of Delaware, does I object to  
24 the question. And all of the ones that

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1 **legislative body.**  
2 Q. You don't have any independent opinion on  
3 that apart from what you read and the opinion of the  
4 judge?  
5 **A. No.**  
6 Q. No you don't have any independent opinion?  
7 **A. No, I do have an opinion.**  
8 Q. Oh, all right well then explain to me what  
9 you meant by legislative body?  
10 **A. I meant that if you want to compare us to**  
11 **what the legislature does in Dover, you know, they**  
12 **make laws, set policies. We set policies and do**  
13 **everything else that a Board is supposed to be, you**  
14 **know, to do, that we are elected to do. There is a**  
15 **similarity.**  
16 Q. There is a similarity in that you set  
17 policies?  
18 **A. We set policies.**  
19 Q. So, now to come back to my earlier  
20 question. I could ask it in a different way, does  
21 the General Assembly make decisions about what  
22 textbooks should be bought for district schools?  
23 **A. Not that I'm aware of.**  
24 Q. Or pick sods for athletic fields?

1 followed.  
2 Q. You answered my question about your opinion  
3 about the School Board being a legislative board by  
4 comparing the School Board to the General Assembly,  
5 correct?  
6 **A. Yes.**  
7 Q. Let me ask a couple of more questions. The  
8 General Assembly doesn't approve field trips, does  
9 it?  
10 MR. GOSSELIN: Objection.  
11 **A. No.**  
12 Q. More generally in our -- in the structure  
13 of our government, is the General Assembly  
14 responsible for enforcing and administering the  
15 policies that it sets, the laws that it passes?  
16 MR. GOSSELIN: Objection.  
17 **A. Ask me the question again please, if you**  
18 **would?**  
19 Q. Sure. In our government in the State of  
20 Delaware is the General Assembly responsible for the  
21 administration and enforcement of the statutes and  
22 laws that it passes?  
23 MR. GOSSELIN: Objection.  
24 **A. Not that I'm aware of.**

6 (Pages 18 to 21)

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1 Q. You on the other hand as a School Board  
2 mention are responsible for the enforcement and  
3 administration of the policies that you pass, isn't  
4 that right?  
5 **A. Yes.**  
6 Q. Let me ask you this, on a percentage basis  
7 over the 30 years of your service as a Board member  
8 what percentage of your time at public meetings has  
9 been spent in the consideration of policies and what  
10 percentage of time has been spent on other areas of  
11 responsibility?  
12 **A. We have a committee that gives us a report**  
13 **each Board meeting on policy. If there are some to**  
14 **adopt I'd say maybe just a range of 15 to 20, 25**  
15 **minutes a meeting.**  
16 Q. On policy?  
17 **A. Yes.**  
18 Q. And the remainder on non-policy issues?  
19 **A. Yes.**  
20 Q. In the course of your tenure as a School  
21 Board member are you aware of any instance in which  
22 a School Board member has been accused of violating  
23 or failing to comply with a Board policy?  
24 **A. Not that I'm aware of.**

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1 Q. Do you know what the process would be for  
2 disciplining a School Board who violated a School  
3 Board policy?  
4 **A. Never had the issue to do it, but I would**  
5 **assume that we would come before the rest of the**  
6 **Board members and we would discuss it.**  
7 Q. Fair enough. So, you are not aware of a  
8 specific policy that sets that process but that as  
9 for example as Board president is what you  
10 anticipate what would happen?  
11 **A. Yes.**  
12 Q. I asked you some general questions about  
13 student attendance at school Board meetings and I  
14 want to ask some more specific questions. The  
15 minutes of the meetings reflect a presentation of  
16 the colors at virtually every meeting, is that  
17 consistent with your recollection?  
18 **A. Yes, except during the summer months.**  
19 Q. Summer months being when the kids are out  
20 of school?  
21 **A. Yes.**  
22 Q. So during the academic school year  
23 September to June you would have presentation of  
24 colors?

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1 **A. Yes.**  
2 Q. And the colors are presented by the student  
3 ROTC groups from the two high schools in the  
4 district?  
5 **A. Yes.**  
6 Q. Who invites them to do that or do they just  
7 know that they are suppose to show up?  
8 **A. I believe it's the building principal.**  
9 Q. Building principal of the school in which  
10 you're meeting?  
11 **A. Yes.**  
12 Q. So, if you were at during the construction  
13 projects a couple of years ago, if you were at the  
14 elementary school the principal of the elementary  
15 school would invites the ROTC?  
16 **A. No.**  
17 Q. I misunderstood you then, who would invite  
18 them?  
19 **A. Well, right how it's because we have two**  
20 **high schools and that's where the ROTC and it would**  
21 **be the principals of the two high schools.**  
22 Q. So, if you are meeting at Indian River High  
23 School the Indian River principal remind the ROTC  
24 group to show up for the Board meeting?

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1 **A. Yes.**  
2 Q. And similarly at the other high school?  
3 **A. Yes.**  
4 Q. Sussex Central, correct?  
5 **A. Yes.**  
6 Q. And who instructs the principals to tell  
7 the ROTC to show up at the meetings? How do the  
8 principals find out that they should remind the  
9 ROTC?  
10 **A. To the best of my knowledge ever since the**  
11 **ROTC has been there that's been the process.**  
12 Q. Do you know how long the ROTC has been in  
13 place?  
14 **A. Probably around five years.**  
15 Q. 2000 or thereabouts?  
16 **A. Yes. I'm not positive but it's somewhere**  
17 **around there.**  
18 Q. We talked about students attending the  
19 meetings for the receipt of awards or recognition,  
20 who invites them to those meeting?  
21 **A. The building principal.**  
22 Q. The building principal in the school in  
23 which the meeting is being held?  
24 **A. Well, normally they try to do that to keep**

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1 down on the travel. But, for example if the meeting  
2 was going to be held at Indian River, this next  
3 meeting.  
4 Q. Yup.  
5 A. The principal would submit a letter to  
6 central office of recent awards that has been  
7 generated by his students and they would be invited  
8 to come to the meeting.  
9 Q. So, it would be the building principal  
10 sends a some kind of memo to the central office  
11 saying would you please recognize my students who  
12 have done something notable in the last period and  
13 then the central office would invite the students?  
14 A. As I understand it.  
15 Q. And how does the central office invite the  
16 student, by a letter?  
17 A. Well, can we go back a minute?  
18 Q. Yup.  
19 A. The principal does all of that. The  
20 principal send a notice to central office was these  
21 are the ones that, you know, deserve that.  
22 Q. Got you.  
23 A. But to the best of my knowledge the  
24 principal is the one that also sends out the notices

1 portion of the meeting?  
2 A. There's been some discussion, yes.  
3 Q. Is there some sense that maybe that the  
4 awards portion of the Board meeting will be  
5 eliminated?  
6 A. I can't answer that, I don't know.  
7 Q. Has there been any discussion of that  
8 possibility?  
9 A. Not on the Board level, no.  
10 Q. Has there been discussion of that among  
11 Board members outside of the Board meeting?  
12 A. Yes.  
13 Q. Who has had such discussions according to  
14 your knowledge?  
15 A. I've discussed it with a certain few.  
16 Q. Which ones?  
17 A. I know that I did with Dr. Hattier,  
18 Mr. Helms, Mrs. Bunting, Mrs. Mitchell.  
19 Q. When did the first of those discussions  
20 occur roughly speaking?  
21 A. Probably within the last six months.  
22 Q. And who initiated discussion you or the  
23 other side of the conversation?  
24 A. I did.

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1 to invite the students to come to the meeting.  
2 Q. Understood. So, in effect the principal  
3 tells the central office here are my kids who are  
4 going to be at the meeting, I have invited them?  
5 A. Pretty much, yes.  
6 Q. And is that process a process that was set  
7 up by the Board at some point in the mid '90s?  
8 A. It was done by the superintendent.  
9 Q. Who is the superintendent?  
10 A. Lois Hobbs, the previous superintendent.  
11 Q. Let me explore that a little bit. Did Miss  
12 Hobbs present to the Board the idea that it would be  
13 good for the Board to recognize achievement of  
14 students in the schools?  
15 A. Yes.  
16 Q. Was there any dissent from that?  
17 A. Not that I'm aware of.  
18 Q. Everybody thought it was a good idea?  
19 A. Yes.  
20 Q. I understand that recently there has been  
21 some rumblings that maybe it's gotten out of hand,  
22 is that correct?  
23 A. That's it's gotten out of hand.  
24 Q. That it's taking too long, the awards

1 Q. What prompted you to raise that issue?  
2 A. Because of the length of the Board  
3 meetings.  
4 Q. Your sense as Board president is that they  
5 are going awfully long?  
6 A. Yes.  
7 Q. And that seemed like a possible way to cut  
8 the length of the meetings?  
9 A. One possible way.  
10 Q. And did you separately raise the issue with  
11 Dr. Hattier, Mr. Helms, Ms. Bunting and Dr. Isaacs  
12 -- Mitchell, sorry?  
13 A. Mrs. Mitchell? Did I raise the issue?  
14 Q. Yes.  
15 A. Yes.  
16 Q. What was the response from each of those  
17 persons?  
18 A. I don't know that I had a direct response  
19 from them.  
20 Q. Did you raise it orally in a conversation  
21 or did you send them a note?  
22 A. Just by talking to them.  
23 Q. And this is when you bumped into each of  
24 them some time during the day?

8 (Pages 26 to 29)

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1 **A. Or we go to meetings you know on the state**  
2 **level together, we ride together.**  
3 Q. Okay. I think you told me you didn't know  
4 that you had a response from them, you raised the  
5 issue did they say anything to you back responding?  
6 **A. We discussed it but we haven't made any**  
7 **decision on it.**  
8 Q. No, no, I didn't mean what's the decision,  
9 I mean what did they say when you raised the issue?  
10 **A. I think everyone agrees that our meetings**  
11 **are going too long.**  
12 Q. In the course of all of those conversations  
13 did anyone discuss the utility of eliminating  
14 student attendance at Board meetings?  
15 **A. No.**  
16 Q. Only, so far as it related to elimination  
17 of shortening of the Board meetings, correct?  
18 **A. Yes.**  
19 Q. Have you discussed the idea of eliminating  
20 the student award portion of the meetings with the  
21 current superintendent or the former superintendent?  
22 **A. Current superintendent, yes.**  
23 Q. What was her reaction?  
24 **A. We just discussed it.**

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1 Q. What did she say to you?  
2 **A. She didn't agree that we should or**  
3 **whatever, she agrees with me the same at the others,**  
4 **our meetings are going too long we need to try to**  
5 **find a way to shorten the Board meeting.**  
6 Q. Well, you made a proposal to shorten it by  
7 eliminating the student award section of the  
8 meetings?  
9 **A. Well, I need to clarify something.**  
10 Q. Yes, sir.  
11 **A. When we first started with doing this, if a**  
12 **student won a national, like a big award, a national**  
13 **award, we just had a group of students that went**  
14 **away and won a national title. We would never**  
15 **eliminate them. It's for people who might have**  
16 **gotten like a third place finish in something, you**  
17 **know, or a second place finish.**  
18 **The original idea of having this was**  
19 **whoever wins would get the awards and they would get**  
20 **them in front of the Board. Not for everybody that**  
21 **got anything at all to come before the Board.**  
22 Q. I have some sympathy with what you are  
23 telling me. I've waded through the minutes and read  
24 all the awards that have been given, and I don't

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1 mean to single out any particular group, but I  
2 noticed that a group of students were recognized for  
3 participation in the Fifth Grade Yell Group?  
4 **A. Yes.**  
5 Q. Maybe that type of thing would be  
6 eliminated, is that what you're saying?  
7 **A. Yes.**  
8 Q. The current status of these, of the awards  
9 is that a fairly wide swath of students comes before  
10 the Board over the course of a given academic year  
11 as a consequence of how deeply you reach into the  
12 awards and recognition?  
13 **A. Fair assumption, yes.**  
14 Q. Okay. I'm going to try to ask some general  
15 questions that could eliminate more specific ones,  
16 longer more specific ones. Am I correct in my  
17 understanding from the minutes that forever Board  
18 meeting in the academic school year, not the July  
19 and August meetings, but for every Board meeting in  
20 the academic school year since at least June of 2004  
21 there have been students in attendance?  
22 **A. Not every month, no. Do you mean to get**  
23 **awards?**  
24 Q. No, for any purpose.

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1 **A. That's probably true.**  
2 Q. I can now eliminate several pages of my  
3 outline. Are there instances in which students are  
4 required to attend Board meetings?  
5 **A. Not that I'm aware of.**  
6 Q. Are you aware of any instance in which a  
7 student who isn't confronted with a scheduling  
8 conflict has declined an invitation to attend School  
9 Board meetings?  
10 **A. Can you repeat the question?**  
11 Q. Yes. Setting aside instances in which  
12 student has a scheduling conflict and can't come,  
13 are you aware of any instance in which a student has  
14 declined an invitation to attend School Board  
15 meetings?  
16 **A. Not that I'm aware of.**  
17 Q. Is it your expectation as a Board member  
18 that students would view an invitation from the  
19 School Board as an attractive invitation for  
20 recognition of their achievements?  
21 MR. GOSSELIN: Objection.  
22 Q. You can answer.  
23 **A. My opinion it would be, it's an honor for**  
24 **them to come to receive an award.**

9 (Pages 30 to 33)

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1 Q. Yes, sir, and in fact isn't that  
2 essentially what Mrs. Hobbs said back in the mid  
3 '90s when she said we ought to be honoring our  
4 students?  
5 **A. Yes.**  
6 Q. Okay, we identified the ROTC, and we  
7 identified student who come to the Board meetings to  
8 receive awards or recognition, is it also the case  
9 that student government representatives address the  
10 Board regularly?  
11 **A. During the time of the school year, yes.**  
12 Q. Yes, sir, and in fact there is now a  
13 section, regular section of the agenda called  
14 student government which is intended to provide the  
15 student government representatives with an  
16 opportunity to address the Board, is that correct?  
17 **A. Yes.**  
18 Q. And that practice was established back in  
19 it 1999s, is that correct?  
20 **A. That was one of the things that was done by**  
21 **a Board member who made the suggestion, it wasn't**  
22 **done by Mrs. Hobbs.**  
23 Q. No, sir, I didn't suggest that it was  
24 separate from the award issue.

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1 **A. Yes, it's probably been going on longer**  
2 **than the awards issue that she recommended that we**  
3 **do.**  
4 Q. Do you have any recollection of when it  
5 began?  
6 **A. No, I'm not sure.**  
7 Q. I'm going to mark as exhibit, Plaintiff's  
8 Exhibit 32 a document bearing Bates number, I should  
9 have told you, Bates numbers you will see on the  
10 bottom of most of the documents I give you, there is  
11 a little printed number. Some guy named Bates  
12 invented this system. So, we identify them on the  
13 record by Bates numbers so people reading the  
14 transcript know what we are talking about.  
15 So, this is a document titled Minutes of  
16 the Board of Education Special Meeting on July 19,  
17 1994, it's bearing Bates numbers PR206 through 210.  
18 (WHEREUPON, Plaintiff's Exhibit 32  
19 was marked for identification)  
20 MR. ALLINGHAM: I can't remember  
21 if I told you Jason we decided last night  
22 we are going to sequentially number and  
23 call them Plaintiff's Exhibits so that we  
24 don't -- I never know which is the better

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1 way, but that's how we are going to do it.  
2 MR. GOSSELIN: I prefer -- well,  
3 you don't care what I prefer. This is  
4 fine, this is what I prefer.  
5 MR. ALLINGHAM: I feel better  
6 then.  
7 Q. None of this is a memory test, sir. If you  
8 look at page four of the document Plaintiff's  
9 Exhibit 32, under student government which is the  
10 third heading, you will see that Mr. Cohee reports  
11 on a meeting he had at Sussex Central with some  
12 students who talked about a lack of communication  
13 and the inactive student government, and Mr. Cohee  
14 then made a motion, according to the minutes that  
15 you seconded, to include on the agenda a ten minute  
16 segment for student government for both high schools  
17 and the motion passed unanimously.  
18 Does that refresh your recollection that it  
19 was in 1994 that that agenda item was added?  
20 **A. I wasn't sure of the date that it was done,**  
21 **but I know Mr. Cohee is the one who brought it.**  
22 Q. And looking at these minutes does that  
23 refresh your recollection that it was 1994?  
24 **A. This says July 19, 1994.**

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1 Q. Right above that heading, there is a  
2 heading in the minutes called public comments in  
3 which it's reported you made a motion seconded by  
4 Mr. Moore to add a 15 minutes segment for public  
5 comments at the beginning of regular Board meetings,  
6 do you recall having done that?  
7 **A. Yes.**  
8 Q. Why did you do that?  
9 **A. I thought it was important for people in**  
10 **the community to come and talk to us about things**  
11 **that was on their minds, concerns or anything like**  
12 **that or have input.**  
13 Q. Is there any restriction on what people can  
14 say during that public comment period?  
15 **A. They cannot talk about anything to do with**  
16 **personnel issues.**  
17 Q. What's the reason for that?  
18 **A. Because personnel issues are private.**  
19 Q. Any other restrictions at all?  
20 **A. Other than the fact that it's supposed to**  
21 **be limited to 15 minutes and if you come to speak as**  
22 **an individual it's three minutes and if you speak as**  
23 **group I believe you are entitled to four minutes.**  
24 Q. Have those time limits been in existence

10 (Pages 34 to 37)

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1 ever since 1994 when the public comment period was  
2 adopted?  
3 **A. To the best of my knowledge.**  
4 Q. You're now Board president, and so you sort  
5 of run the meeting, is that right?  
6 **A. Yes.**  
7 Q. Isn't there also a restriction on people  
8 are not — you would be permit people to make  
9 offensive comments?  
10 **A. Yes.**  
11 Q. Or derogatory comments?  
12 **A. Yes.**  
13 Q. And that's just part of your responsibility  
14 to keep order at the meeting?  
15 **A. Yes.**  
16 Q. Is it your view that public comments should  
17 be respectful?  
18 **A. Should be respectful?**  
19 Q. Yes.  
20 **A. Yes.**  
21 Q. Is it also your view as a Board member that  
22 the establishment of the public comment portion of  
23 the meeting was rather than being required by law it  
24 was an effort by the Board to confer a privilege of

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1 communication on the general public?  
2 **A. Yes.**  
3 Q. And it's your view as a Board member that  
4 that privilege should not be abused?  
5 **A. Yes.**  
6 Q. Since 1994 when the student government  
7 portion of the meeting was established has it been  
8 the case that most meetings during the academic  
9 school year student government representatives have  
10 addressed the Board?  
11 **A. During the school year?**  
12 Q. Yes.  
13 **A. Yes.**  
14 Q. Is it your practice that when they speak,  
15 the student representatives speak to the Board, that  
16 the nature of their remarks is identified in the  
17 minutes?  
18 **A. I don't think it's verbatim.**  
19 Q. Is the fact that a student representative  
20 spoke reflected in the minutes?  
21 **A. To the best of my knowledge.**  
22 Q. That's your intent anyway?  
23 **A. Yes.**  
24 Q. When you come to the student government

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1 portion of the agenda do you as the board president  
2 invite the student government representatives to  
3 come forward to speak?  
4 **A. Yes.**  
5 Q. Describe for me, if you can, the nature of  
6 the topics that student government representatives  
7 have discussed with the Board over the years?  
8 **A. Any awards that the school might have won**  
9 **since the previous time they spoke, scores of**  
10 **athletic events, the placement of the, on the state**  
11 **log of where we rank, if we are having a good year**  
12 **and things like that they do that. And they invite**  
13 **us to certain things that's coming up like maybe a**  
14 **concert or a ROTC dinner or things like. We are**  
15 **invited to come to things like that. That's**  
16 **basically what they do.**  
17 Q. And does the School Board or individual  
18 members of the School Board accept those invitations  
19 and attend those events?  
20 **A. I try to go to as many as I possibly can.**  
21 Q. Do you see fellow Board members there?  
22 **A. Yes.**  
23 Q. This may sound like a funny question  
24 Mr. Bireley, but do you view you take your

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1 responsibilities as a Board member seriously, don't  
2 you?  
3 **A. Yes.**  
4 Q. And is it your sense that your fellow Board  
5 members also take their responsibilities seriously?  
6 **A. Yes.**  
7 Q. Have you ever had a sense that your  
8 colleagues on the Board were not trying their best  
9 to discharge their responsibilities as Board  
10 members?  
11 **A. No.**  
12 Q. So, this will sound like a summary  
13 question, and it is, in your 30 years or so of  
14 service on the Board you have throughout those 30  
15 years of service you have been confident that your  
16 fellow Board members are using their best efforts to  
17 discharge their Board responsibilities  
18 appropriately?  
19 **A. To the west of my knowledge?**  
20 Q. Yeah.  
21 **A. Yes.**  
22 Q. Do student government representatives from  
23 time to time express concerns to the Board about  
24 issues in their schools?

11 (Pages 38 to 41)

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1 **A. Yes.**  
2 Q. Give me an example of some concerns that  
3 they've expressed?  
4 **A. The period of time that Sussex Central was**  
5 **going through their construction and they actually**  
6 **were placed in a building maybe a year ahead of time**  
7 **they shouldn't have been there, and it was -- well**  
8 **basically it was not a very good experiences for**  
9 **them. We heard some of that type of thing.**  
10 Q. It's a legitimate concern?  
11 **A. Yes.**  
12 Q. Any other that you can think of?  
13 **A. Not that I can remember.**  
14 Q. Do student groups sometimes attend Board  
15 meetings?  
16 **A. Yes.**  
17 Q. Can you give me some examples?  
18 **A. Well, I consider it to be a group when the**  
19 **come in to get their awards if that's what you mean.**  
20 Q. No, I meant you know musical groups or I  
21 guess the ROTC would qualify as a group, some group  
22 that attends Board meetings as a group?  
23 **A. Yes.**  
24 Q. Can you give me some examples?

1 Board, do you recall that?  
2 **A. At a Board meeting?**  
3 Q. Yes.  
4 **A. No, I really don't.**  
5 Q. The student groups that attend the School  
6 Board meetings who invites them?  
7 **A. The students?**  
8 Q. The student groups like the steel band or  
9 the musical groups or ROTC, who invites them?  
10 **A. The superintendent.**  
11 Q. Is that done by a letter to the groups?  
12 **A. I'm not sure.**  
13 Q. Okay. In one of the minutes, and I don't  
14 have it here, so if you don't remember it's not a  
15 big deal, but do you recall a student representative  
16 addressing the Board with concerns about the quality  
17 of the water and quality of the athletic fields at  
18 Sussex Central?  
19 **A. Yes.**  
20 Q. Was it helpful to the Board to get student  
21 input on issues like that?  
22 **A. Yes.**  
23 Q. How did the School Board respond to those  
24 concerns?

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1 **A. Most of the time during the month of**  
2 **December a group would come in to perform either**  
3 **singing or a small acting type thing. The Odyssey**  
4 **of the Mind students have come in and did their**  
5 **little skit that they did in national in front of**  
6 **the Board.**  
7 Q. It SDSA Steel Band, that's a musical group?  
8 **A. Yes.**  
9 Q. Is that one of the December performances?  
10 **A. They came I'm not sure whether it was**  
11 **December, but we have had them there, yes.**  
12 Q. What is the Odyssey of the Mind?  
13 **A. It's a group of student that are elevated**  
14 **students, you know the better students that through**  
15 **creativity they do skits or they do like a play or**  
16 **something like that that they go to state and**  
17 **national competition and be judged with other school**  
18 **districts.**  
19 Q. And so they came and sort of made their  
20 presentation to the Board?  
21 **A. Yes.**  
22 Q. I noticed in some of the older minutes  
23 there were band groups that had done national  
24 competitions and then had performances for the

1 **A. We tried to make them better.**  
2 Q. The student government representative  
3 portion of the agenda is limited to the two high  
4 school, is that right?  
5 **A. Yes.**  
6 Q. Are there instances in which other  
7 representatives of student bodies express concerns  
8 about conditions at their schools, that is a other  
9 than the high schools?  
10 **A. I can't remember.**  
11 Q. Do you recall in August of 2004 a  
12 Selbyville middle school student expressing a  
13 concern about the loss of safety and school climate  
14 positions?  
15 **A. Oh, yes.**  
16 Q. Do you recall students speaking to the  
17 Board about concerns about the Southern Delaware  
18 Schools of the Arts?  
19 **A. Yes.**  
20 Q. And in each of these cases where students  
21 come to the Board to address their concerns, does  
22 the Board benefit from the attendance of the  
23 students and expression of their concerns?  
24 **A. Do they benefit?**

12 (Pages 42 to 45)

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1 Q. Yes. Is it helpful to the Board?  
2 A. Yes.  
3 Q. And in case does the Board try to address  
4 the concerns of the students?  
5 A. Yes.  
6 Q. Is there any other forum for the students  
7 to address the Board other than the public School  
8 Board meeting?  
9 A. Yes.  
10 Q. What is that?  
11 A. They can come in executive session.  
12 Q. Would that be by invitation of the Board  
13 itself?  
14 A. They apply, they write a letter and tell us  
15 that they have something that they want to talk  
16 about which is usual a personnel issue and we allow  
17 them to come.  
18 Q. And that has happened in the past?  
19 A. Yes.  
20 Q. How frequently?  
21 A. Rarely, but we do allow it. The same way  
22 that we allow a person in the community to do the  
23 same thing if it's a personnel issue something that  
24 we are not allowed to discuss during an open session

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1 they come to that.  
2 Q. Oh, I see so there is that limitation in  
3 the public comment session where you can't speak  
4 about personnel issues, but there is a way for a  
5 member of the public to speak to the Board about  
6 personnel issues?  
7 A. Yes.  
8 Q. By making an application to speak at an  
9 executive session?  
10 A. Yes.  
11 Q. How do members of the public — how can  
12 members of the public find out about that avenue for  
13 expressing their concerns to the executive session?  
14 A. They can contact the superintendent.  
15 Q. It's not posted that you can do that  
16 anywhere on the web site or in the policies?  
17 A. I'm not sure.  
18 Q. How would students find out about the  
19 possibility of speaking to executive session?  
20 A. It's like a chain of command. If they have  
21 an issue they can go to the building principal  
22 first. Then they can go to the superintendent and  
23 the superintendent would make them aware that no you  
24 cannot stand up in front of the Board meeting and

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1 talk about this particular issue, however, if you  
2 want to do it in executive session then they would  
3 be told that they can do it in executive session.  
4 Q. So, the superintendent would let them know  
5 which way they could go?  
6 A. Yes.  
7 Q. Apart from speaking to the board at public  
8 sessions, or speaking to the Board in executive  
9 session, is there any other way that students have  
10 the ability to speak directly to the School Board?  
11 A. Other than just maybe seeing us out  
12 somewhere and they make a comment individually.  
13 Q. No other official way to speak to the  
14 School Board?  
15 A. Not that I'm aware of.  
16 Q. It always warms witness' hearts when I  
17 start skipping through and I have a long red line on  
18 the outline.  
19 MS. ALLINGHAM: Miss duPhily has  
20 told me we have about four minutes of tape  
21 left, we are going to change the tape now,  
22 just take a minute.  
23 MS. DUPHILY: Going off the record  
24 at approximately 10:10 a.m..

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1 (WHEREUPON a brief recess was  
2 taken)  
3 MS. DUPHILY: We are back on the  
4 record at 10:15 a.m..  
5 Q. Mr. Bireley, among all of the people that,  
6 this goes back to a question earlier this morning,  
7 among all the people that you spoke to about the  
8 possibility of eliminating the awards section or a  
9 portion of the awards section at the Board meetings,  
10 did anyone say to you look I really oppose that, I  
11 think we need to continue this practice?  
12 A. No.  
13 Q. Did some or all of those persons express  
14 agreement that the level of award that was getting  
15 recognition at the Board had become pretty  
16 expansive?  
17 A. Mostly, yes.  
18 Q. Those awards do include recognition for  
19 awards that district students or groups achieve on a  
20 state or national level, correct?  
21 A. Yes.  
22 Q. Can you think of recent state or national  
23 awards that you gave recognition for groups to?  
24 A. The Odyssey of the Mind, I think that was

13 (Pages 46 to 49)

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1 the most recent.

2 Q. What was that?

3 A. They won a national award, they are  
4 considered the best in the world.

5 Q. For their performance of this?

6 A. Yes.

7 Q. Is it like a persuasive performance or  
8 something?

9 A. It's something I don't know exactly how to  
10 describe it, I mean I've seen their plays or their  
11 skits. They do it themselves. If they dress, you  
12 know if they have a costume or something they make  
13 their own costume, if they have to have like  
14 background like in the theater, they make their own.  
15 It's truly a work of art that they do for a younger  
16 student.

17 Q. What level of student is this?

18 A. I believe they were under eight, under the  
19 eighth grade.

20 Q. Under the eighth grade?

21 A. Yes.

22 Q. Okay?

23 A. There is different levels of Odyssey of the  
24 Mind and I'm trying to think of the age limit of the

1 open its meetings with a prayer?

2 A. To it best of my knowledge we've been doing  
3 it ever since I first became a Board member, 1974.

4 Q. So, from your own personal knowledge you  
5 can testify that the Board has had a regular  
6 practice of opening meetings with a prayer since  
7 1974?

8 A. Yes.

9 Q. You've been quoted in the media as having  
10 said this has been a practice of the Board since  
11 1969, do you recall that?

12 A. Yes.

13 Q. How did you link up the five years between  
14 '69 and 1974?

15 A. I had previous Board members tell me that's  
16 what they did.

17 Q. Who were those board members?

18 A. That were there before me?

19 Q. the people who told you that that's what  
20 the School Board did before 1974?

21 A. Harold Short, Charles Mitchell. those are  
22 the two that come to mind right now.

23 Q. And the timing of their having told you,  
24 that is did they tell you that in 2006 or 2005 or

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1 ones that won. They weren't very old I'm not  
2 exactly sure how old they were.

3 Q. Middle school kids?

4 A. No, younger than middle school. Well, see  
5 I am confused, the one that one it was mainly  
6 students from this builder here the school of the  
7 arts, and it does go to the eighth grade. So, they  
8 could be.

9 Q. When a student receives an award is his or  
10 her picture taken with you or whoever the Board  
11 president is at the time?

12 A. Yes.

13 Q. And is that picture then sent home to the  
14 student with a letter of congratulations from the  
15 Board?

16 A. I'm not sure about that.

17 Q. One of the topics on which you have been  
18 designated as the District's representative for  
19 under this 30(b)(6) designation is the history of  
20 the Board's practice of opening its meetings with a  
21 prayer, so I want to ask some questions about that  
22 now?

23 A. Okay.

24 Q. When did the School Board first begin to

1 2004, or did they tell you that back in '74 when you  
2 said you know we've been doing this for a long time?

3 A. When I first came to the Board.

4 Q. And so how did that issue come up in 1974,  
5 did you say hey why do we open meetings with a  
6 prayer or did they volunteer to you that it had  
7 always been the School Board's practice to open  
8 meetings with a prayer?

9 A. It was like a orientation, to tell me, you  
10 know, what had gone on in the past what's sort of  
11 expected of me as a Board member.

12 Q. So, part of your orientation was to let you  
13 know that School Board meetings are opened with a  
14 prayer?

15 A. Yes.

16 Q. And did the orientation include this  
17 business of letting you know what you needed to do  
18 as a Board member, did they tell you that you'd be  
19 expected, you personally, would be expected to on a  
20 rotating basis open the Board meeting with a prayer?

21 A. No.

22 Q. So, it was simply a matter of they said to  
23 you Board meetings open with a prayer?

24 A. They just explained, you know, the

14 (Pages 50 to 53)

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1 **procedure.**  
2 Q. Did they say why?  
3 **A. No.**  
4 Q. Did they say we open the meetings with a  
5 prayer, by the way we've been doing that since 1969?  
6 **A. Not that I can remember.**  
7 Q. In didn't seem sensible, does it?  
8 **A. No.**  
9 Q. Is there any other way that you have been  
10 able to trace that practice back to 1969?  
11 **A. No.**  
12 Q. You haven't looked at documents to see  
13 whether the meetings opened with prayers?  
14 **A. Prior to '74?**  
15 Q. Yes.  
16 **A. No.**  
17 MR. ALLINGHAM: I'm going to mark  
18 as Plaintiff's Exhibit 33 a document  
19 bearing bates numbers PR00030 through 34.  
20 (WHEREUPON Plaintiff's Exhibit 33  
21 was marked for identification.)  
22 Q. PX33 which I've just had handed to you Mr.  
23 Bireley, is a documents titled Board of Education  
24 regular meeting Tuesday March 28, 1972. and if you

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1 look at the last page you will see it's signed by  
2 James Proudfoot as secretary. Is it the practice of  
3 the Indian River School Board to maintain the final  
4 versions of the minutes in its minute books?  
5 **A. To the best of my knowledge.**  
6 Q. And the indication that the minutes have  
7 been approved by the Board as accurate is when the  
8 secretary signs those minutes, is that correct?  
9 **A. To the best of my knowledge.**  
10 Q. Do you have any reason to doubt that these  
11 are it official minutes of March 28, 1972?  
12 **A. No.**  
13 Q. Okay. If you look at the first paragraph  
14 of PX33 you will see that after the meeting is  
15 called to order by president Reese, president Reese  
16 asked Mr. Jefferson to lead the group in prayer.  
17 I'm going to represent to you Mr. Bireley  
18 that I have reviewed the minutes of the meetings  
19 from July 1968 through February 1972, that is all  
20 the minutes we have prior to this March 28, 1972  
21 minutes, and that none of them reflects an  
22 invitation to lead the group in prayer or the giving  
23 of a prayer at the opening of the meeting. Do you  
24 know whether of your own personal knowledge, or from

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1 someone else, whether the Board opened its meetings  
2 with a prayer prior to March 1972?  
3 **A. Other than what I just told you a few**  
4 **minutes ago during my orientation.**  
5 Q. Yes, sir. Do you still believe in light  
6 of, accepting the representation that I have just  
7 given you, which is that the minutes do not reflect  
8 that the Board opened its meetings with a prayer at  
9 any meeting that we have before March 1972, do you  
10 have any reason to believe that the Board did open  
11 its meetings with a prayer prior to March 1972?  
12 **A. Other than my conversation with Mr. Short**  
13 **when I got my orientation.**  
14 Q. Now, and I'm just going to ask you given  
15 your service on the Board, because I assume you have  
16 no personal knowledge about the practice, personal  
17 direct knowledge about the practice of the Board  
18 before you joined it, is that correct?  
19 **A. That's correct.**  
20 Q. Beginning when you joined the Board, who  
21 would decide which school -- one preliminary  
22 question. Were there meetings at which the School  
23 Board did not open its meeting with a prayer?  
24 **A. Not that I'm aware of.**

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1 Q. So, to the best of your recollection at  
2 every Board meeting during your service as a Board  
3 member the School Board opened the meeting with a  
4 prayer?  
5 **A. To the best of my knowledge.**  
6 Q. Who decided, and this is all prior to the  
7 more recent adoption of the School Board Prayer  
8 Policy, who decided which Board member would lead  
9 the group in prayer or offer a prayer?  
10 **A. The Board president.**  
11 Q. How was it decided which School Board  
12 member would open the meeting with a prayer?  
13 **A. The Board president just asked someone, I**  
14 **don't know how.**  
15 Q. Were there any restriction of any kind on  
16 what sort of prayer a School Board member could  
17 over?  
18 **A. Not that I'm aware of.**  
19 Q. Prior to the adoption of Policy BDA.1,  
20 which is the School Board Prayer Policy in October  
21 of 2004, was there any policy that governed the  
22 offering of prayer at School Board meetings?  
23 **A. Not that I'm aware of.**  
24 Q. Were you ever asked to lead the Board in

15 (Pages 54 to 57)

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1 prayer or offer a prayer at the beginning of School  
2 Board meetings prior to the adoption of the School  
3 Board policy?  
4 **A. No.**  
5 Q. So, 1974 to 2004 is the period of time  
6 during which you were a School Board member with a  
7 three year hiatus, so if my arithmetic is right  
8 that's 27 years of service prior to the adoption of  
9 Board Policy BDA.1, and you were never asked to  
10 offer a prayer at a School Board meeting?  
11 **A. That's correct.**  
12 Q. Do you know why?  
13 **A. No.**  
14 Q. Did you ever tell any Board president that  
15 you were not interested in offering a prayer at the  
16 School Board meeting?  
17 **A. No.**  
18 Q. Again, if my arithmetic is correct, that's  
19 well over 300 School Board meetings at which  
20 somebody offered a prayer, but you were not invited  
21 to do so, did that strike you as off or unusual?  
22 **A. No.**  
23 Q. Did you perceive any pattern in the Board  
24 president's practice in the selection of the person

1 Q. Was a Muslim Board member ever included in  
2 that group?  
3 **A. I don't call us having a Muslim Board**  
4 **member.**  
5 Q. Or a Buddhist?  
6 **A. Same answer.**  
7 Q. A non-Christian Board member ever included  
8 in that group?  
9 **A. I don't recall us ever having that type of**  
10 **Board member.**  
11 Q. Would you characterize the members of that  
12 smaller group as being particularly religious  
13 amongst their peers?  
14 MR. GOSSELIN: Objection.  
15 **A. Do I answer?**  
16 Q. Yes, sir.  
17 **A. Can you please ask that question again?**  
18 Q. Was it -- did you perceive that the  
19 criteria for selection of this smaller group was  
20 that these were folks who were particularly  
21 religious?  
22 MR. GOSSELIN: Objection.  
23 **A. No.**  
24 Q. Let me just ask the broad question, is it

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1 who would be invited to offer the prayer?  
2 **A. It was usually done by a small portion of**  
3 **the group of ten.**  
4 Q. And did they have any common  
5 characteristics, the small portion?  
6 **A. Not that I'm aware of.**  
7 Q. Do you know how that small group, smaller  
8 group was identified by the Board?  
9 **A. To my knowledge the Board president would**  
10 **call on someone at the Board meeting to say the**  
11 **prayer, that's all I know.**  
12 Q. But you told me that a small group of the  
13 Board was asked to offer the prayer, a group that  
14 you were not a member of, do you know how that group  
15 was identified or picked or selected to be the ones  
16 who would offer the prayer?  
17 **A. No.**  
18 Q. How small a group, two, three?  
19 **A. Three, four, somewhere in that**  
20 **neighborhood.**  
21 Q. Was a Jewish Board member ever included in  
22 that group?  
23 **A. I don't recall us ever having a Jewish**  
24 **Board member.**

1 your testimony that you have no idea how this, how  
2 the members of this smaller group were selected by  
3 the School Board president on which you served?  
4 **A. That's true.**  
5 Q. And you wasn't interested in finding out  
6 how they were picked?  
7 **A. It wasn't -- I guess the answer is yes I**  
8 **wasn't, that I wasn't interested.**  
9 Q. Just wasn't a topic that you were  
10 interested in?  
11 **A. No, that's not. I just think that there**  
12 **was a certain group, just like there is a certain**  
13 **group now who does a better job of saying the**  
14 **prayer.**  
15 Q. Actually that's very helpful to me. Is  
16 that -- doing a better job at saying a prayer is  
17 that that they are just better at offering, you  
18 know, inspirational prayers?  
19 **A. In my opinion, yes.**  
20 Q. And is that because they are better at --  
21 tell me what you mean by better, what constitutes a  
22 better prayer?  
23 **A. Some people it just naturally flows, you**  
24 **know, it's very commonplace with them they can do**

16 (Pages 58 to 61)

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1 **it. They can do it at a heart beat.**  
2 Q. Is that the way it is even today on the  
3 Board?  
4 **A. With some, yes.**  
5 Q. Who are the people that you would identify  
6 as the people on the Board today who are better at  
7 offering a prayer?  
8 **A. Right now, Mr. Helms, Dr. Hattier, Mrs.**  
9 **Bunting, Mrs. Mitchell.**  
10 Q. Let me ask you this question, having  
11 observed for 27 years the practice of conferring the  
12 invitations to a smaller subset of the Board, did  
13 you think that that worked well?  
14 **A. Yes.**  
15 Q. The School Board Prayer Policy BDA.1  
16 provides for something different from that practice,  
17 do you know that?  
18 **A. Yes.**  
19 Q. And did you believe that it was appropriate  
20 to make that change?  
21 **A. To make what change?**  
22 Q. The change from extending the invitations  
23 to his pray to a small subset of the Board, a change  
24 from that practice, to the practice of rotating the

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1 invitation among all of the Board members?  
2 **A. Since I've been Board president I've asked**  
3 **for anyone who wishes to do that to let me know, and**  
4 **if they don't tell me that they want to do it then**  
5 **I'll call on that rotating group that I normally do.**  
6 Q. Okay. You have been Board president the  
7 entire tenure, you entire tenure as Board president  
8 has occurred after passage of School Board Prayer  
9 Policy BDA.1, correct?  
10 **A. Me entire tenure?**  
11 Q. Yes.  
12 **A. No.**  
13 MR. GOSSELIN: As president.  
14 **A. I have been president before that, is that**  
15 **what you mean?**  
16 Q. Oh, oh, I'm sorry, I thought this was your  
17 first tenure as Board president?  
18 **A. No.**  
19 Q. When were you Board president before this?  
20 **A. I can't tell you exact years, but it's like**  
21 **eight or nine years.**  
22 Q. Okay and during your tenure as Board  
23 president prior to 2004 when the Board policy has  
24 adopted, you selected the people to whom you would

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1 extend an invitation to lead the group in prayer on  
2 the basis that you have just told me, which is they  
3 were the people who were good at it?  
4 **A. But I also asked the other members of the**  
5 **Board if they wished to do that, to let me know and**  
6 **if they didn't let me know then I just called on**  
7 **that group, yes.**  
8 Q. And I want to separate now pre October 19,  
9 2004 to post October 19, 2004 in the pre-policy,  
10 pre-October 2004 period, you selected the people  
11 that you were going to extend an invitation to on  
12 the basis of whether they were good at it, correct?  
13 **A. Whether they wanted to. In other words,**  
14 **whether they wanted to say a prayer.**  
15 Q. Yes, sir. And then you also tried to let  
16 the remaining Board members know that if they wanted  
17 to be included in that group you would include them?  
18 **A. Yes.**  
19 Q. Did anybody during your tenure, pre policy  
20 tenure as a Board member, did anybody to whom you  
21 said hey I haven't been inviting you to offer the  
22 prayer, but if you want me to invite you I will.  
23 Anybody say actually I would like to be invited?  
24 **A. No.**

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1 Q. But you did have a conversation in words or  
2 substance like that with everybody to whom you had  
3 not offered the invitation previously?  
4 **A. Previous to that, yes.**  
5 Q. Dr. Hattier testified yesterday, that he  
6 works very hard to prepare his prayer, that it  
7 doesn't flow easily, and he is not good at direct  
8 quotations, he tries to write down what he's going  
9 to say, is that consistent with your notion that Dr.  
10 Hattier would fall into the group that is better at  
11 offering a School Board prayer?  
12 **A. Yes.**  
13 Q. Is that because the content of the prayers  
14 that he offers after his hard work seems to you to  
15 be inspirational?  
16 **A. Yes.**  
17 Q. Seems to you to serve the purpose of School  
18 Board prayer?  
19 **A. Yes.**  
20 Q. So, in Dr. Hattier's case it's the content  
21 of the prayer that leads you to select Dr. Hattier?  
22 **A. Yes.**  
23 Q. The group of people that you identified for  
24 me on the current Board that are good at, I'm using

17 (Pages 62 to 65)

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1 a generic term, but that would be in that smaller  
2 subset of the Board, I want to, make sure because I  
3 have some questions based on the membership of that  
4 sub group, is Dr. Hattier, Mr. Helms, is it Ms.  
5 Mitchell or Dr. Mitchell?  
6 **A. Mrs. Mitchell.**  
7 Q. And Mrs. Bunting, correct?  
8 **A. Correct.**  
9 Q. Have you ever heard Mr. Helms -- first of  
10 all, since the adoption of the policy have you as  
11 Board president invited each of those four people to  
12 take up the opportunity established by the Board  
13 policy to open the meeting with a prayer?  
14 **A. The ones that we are talking about now?**  
15 Q. Those four that I just identified?  
16 **A. To the best of my knowledge, yes.**  
17 Q. And has each of those persons accepted the  
18 invitation when you extended it?  
19 **A. Yes.**  
20 Q. Have they ever turned it down?  
21 **A. No.**  
22 Q. In the case of Mr. Helms, Mrs. Mitchell and  
23 Mrs. Bunting, do you recall any instance in which  
24 they offered a prayer that did not invoke the name

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1 of Jesus Christ?  
2 **A. That they did not.**  
3 Q. Yes.  
4 **A. Not that I'm aware of.**  
5 Q. And that would be your expectation,  
6 wouldn't it, that each of those three persons would  
7 offer a prayer that would invoke the name of Jesus  
8 Christ?  
9 MR. GOSSELIN: Objection.  
10 Q. You can answer.  
11 **A. Yes.**  
12 Q. Now, I want to explore with you how you as  
13 Board president have implemented the rotational  
14 aspect of Board Policy BDA.1. Have you since the  
15 passage of the policy and during your tenure as  
16 Board president rotated the invitation among all  
17 Board members?  
18 **A. For those who wanted to, yes.**  
19 Q. How did you find out who wanted to and who  
20 didn't?  
21 **A. I did the same thing as I did before, I**  
22 **asked them were they willing, did they want to**  
23 **participate, did they want to issue a prayer, if**  
24 **they did please let me know.**

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1 Q. All right, so when did you become Board  
2 president in 2005, July?  
3 **A. July 1st.**  
4 Q. So, some time before the July 2005 Board  
5 meeting you contacted each of the Board members to  
6 ask whether they wanted to be extended an invitation  
7 to offer the prayer?  
8 **A. The existing Board member and the new Board**  
9 **members come on except the three that are on there**  
10 **now. The three that were recently elected and came**  
11 **on I have not had that conversation with those**  
12 **three.**  
13 Q. The three that were elected in March 2006?  
14 **A. Yes, and that came on July 1st, of this**  
15 **year.**  
16 Q. So, I gather that some Board members when  
17 you contacted them on this issue said no I would  
18 prefer not to be invited to offer the prayer at the  
19 beginning of the meeting?  
20 **A. That's true.**  
21 Q. Which Board members told you that?  
22 **A. I asked Mr. Walls was the one specifically**  
23 **asked me, when I asked him he said he declined right**  
24 **at the present time, but if he chose to do it later**

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1 **he would let me know.**  
2 Q. What other member declined?  
3 **A. None. They just didn't tell me that they**  
4 **wanted to do it.**  
5 Q. I thought you contacted each one to ask  
6 whether they wanted to do it?  
7 **A. I said to them if you want to say a prayer**  
8 **at the Board meeting please let me know.**  
9 Q. And you said that in words or substance to  
10 each of the sitting Board members?  
11 **A. Except the three new ones.**  
12 Q. Yes, sir.  
13 **A. Yes, sir. I'm talking about in July of**  
14 **2005?**  
15 **A. Yes.**  
16 Q. So, Mr. Walls said no thank you, although  
17 he could change his mind, and each of the other  
18 nine including yourself, I guess you'd have to say  
19 it to yourself, but each of the other nine said yes  
20 thank you I would like to be invited, I would like  
21 to be included in the rotation?  
22 **A. No.**  
23 Q. Did anyone say I'd like to be excluded from  
24 the rotation?

18 (Pages 66 to 69)

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1 **A. No.**  
2 Q. Did anyone in some other way indicate that  
3 they would prefer not to be invited?  
4 **A. No.**  
5 Q. Well, in the absence of an indication that  
6 a Board member would prefer not to be included in  
7 the rotation, am I correct that as Board president  
8 you included them in the rotation of persons to whom  
9 the invitation would be extended?  
10 **A. What I did since they chose not to do it,**  
11 **then basically when their name up in order to do it,**  
12 **they chose close not to do it because they didn't**  
13 **tell me that they would I went on to the next one.**  
14 Q. Okay, so I apologize this id just the way  
15 this process goes. Sometimes I am thick, sometimes  
16 I have to get through by questions and answers that  
17 I misunderstand. So, let me, with that apology try  
18 to summarize. You came on as board president in  
19 July. You contacted each Board member to find out  
20 whether they would like to be included in the  
21 rotation of invitations. The only person who  
22 affirmatively said I would like not to be included  
23 at the present time was Mr. Walls?  
24 **A. Yes.**

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1 Q. Subsequent do this, and therefore you at  
2 that time in July established whether you did it,  
3 and I'm going to talk to you about this in a minute,  
4 whether you made a list or you just put it in your  
5 head, you established a rotation of nine Board  
6 members, is that correct?  
7 **A. Pretty much, yes.**  
8 Q. And then you began at each Board meeting  
9 going through your list on a rotational basis,  
10 correct?  
11 **A. I also asked the person prior to that night**  
12 **if they want to do the prayer.**  
13 Q. Okay, and so over the course of the next 14  
14 or 15 months in each case at sometime before the  
15 Board meeting convened you'd ask the next person on  
16 your rotation would you like to offer the prayer  
17 specifically, correct?  
18 **A. No.**  
19 Q. Explain to me what you would do?  
20 **A. I asked the people in a group, not in a**  
21 **group, individually, if you would like to**  
22 **participate in saying a prayer on the Board level,**  
23 **please let me know. If they did not let me know**  
24 **that they wanted to then I never ever asked them**

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1 **again.**  
2 Q. I see.  
3 **A. I went to the next one.**  
4 Q. I apologize. Okay, and that's the  
5 conversation that took place in July?  
6 **A. Well, I'm not sure that it took place in**  
7 **July.**  
8 Q. Or August some time. Some time at the  
9 beginning of your tenure as Board president?  
10 **A. Well, you know I had this same conversation**  
11 **with some of those people prior to that, you know,**  
12 **when I was president before that.**  
13 Q. All right, so the implementation of the  
14 rotation in the School Board Prayer Policy, the way  
15 you have implemented it is to say to the sitting  
16 Board members either at the time either in 2005 or  
17 maybe during a prior time when you served as board  
18 president with those same Board members, the way you  
19 implemented it was to say, if you would like to be  
20 included in the rotation, let me know?  
21 **A. Yes.**  
22 Q. And unless they said yes I'd like to be  
23 included in the rotation you did not include them in  
24 the rotation?

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1 **A. Yes.**  
2 Q. One person in response to your request  
3 affirmatively said I would like to not be included  
4 in the rotation at this time?  
5 **A. Yes.**  
6 Q. And that was Mr. Walls?  
7 **A. Yes.**  
8 Q. So, tell me, which persons affirmatively  
9 said yes I would like to be included in the  
10 rotation?  
11 **A. Dr. Hattier, Mrs. Mitchell, Mr. Helms,**  
12 **Mrs. Bunting. Is that five?**  
13 Q. That's four?  
14 **A. I'm trying to think.**  
15 Q. Do you need a list of the Board members?  
16 It happens to me all the time?  
17 **A. They normally sit at the same chairs, I'm**  
18 **trying to go around. Maybe it's only four. I'm**  
19 **trying to think who is sitting on the other side.**  
20 Q. Mr. Evans?  
21 **A. He is not a Board member anymore.**  
22 Q. In July did he indicate an interest in --  
23 **A. Yeah, he did. I mean he participated I was**  
24 **thinking of right now.**

19 (Pages 70 to 73)

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1 Q. So, is your best guess that those are the  
2 four who indicated an interest in participating?  
3 **A. Well, it would be five including Mr. Evans.**  
4 Q. Five with Mr. Evans, but he is now off the  
5 Board. So, on the current Board you have a group of  
6 four who have affirmatively said I'd like to  
7 volunteer to be in the rotation and offer a prayer?  
8 **A. Yes.**  
9 Q. And you have not yet talked to any of the  
10 three more recently elected Board members?  
11 **A. That is true but their names are coming up,**  
12 **their time, so I would talk to them probably within**  
13 **the next maybe prior to the next Board meeting. I**  
14 **am not sure. I have it written down at home.**  
15 Q. I was just going to ask you that, so how do  
16 you keep track of who's next in the rotation?  
17 **A. Well, I try to make notes for myself.**  
18 Q. And where do you keep those notes?  
19 **A. At home.**  
20 Q. Do you have a Board file of some kind?  
21 **A. No.**  
22 Q. Where did you keep them?  
23 **A. I have a disclaimer, that I'm sure you are**  
24 **aware of that I read before every Board meeting. I**

1 Q. So, the four members who are currently on  
2 your rotation list, my memory is really shot, Dr.  
3 Hattier, Mr. Helms Mrs. Mitchell and Mrs. Bunting,  
4 would you characterize those four as good at  
5 offering school board prayer?  
6 **A. Yes.**  
7 Q. I don't know how else to say it, they are  
8 skilled at it?  
9 **A. Yes.**  
10 Q. In your home where do you keep the  
11 disclaimer page?  
12 **A. In my office.**  
13 Q. Do you keep any other materials related to  
14 your service as a Board member or Board president  
15 with that disclaimer page?  
16 **A. No.**  
17 Q. So you have a single page that relates to  
18 the School Board and your service as a member in  
19 your home?  
20 **A. It's usually in the packet, the Board**  
21 **packet.**  
22 Q. Do you keep the Board packet?  
23 **A. Do I keep them?**  
24 Q. Yes.

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1 **make a note on that.**  
2 Q. And this is going to sound tedious, but I'm  
3 trying to identify precisely what objects there are  
4 that have the words, so do you have a pad that has  
5 the disclaimer?  
6 **A. It's just a single piece of paper like this**  
7 **that has the disclaimer that I read at each Board**  
8 **meeting.**  
9 Q. What do you do write down the name of the  
10 person who gave the prayer?  
11 **A. That who is suppose to do it, yes.**  
12 Q. And then how do you know who the next  
13 person is in the rotation?  
14 **A. The one that -- I try to go by the one --**  
15 **in other words, for the ones who are doing it right**  
16 **now, there is four of them, then that other one will**  
17 **not do it again for four months as it stands right**  
18 **now.**  
19 Q. And so how do you remember what has gone in  
20 the preceding three months and who is next?  
21 **A. I make notes of it.**  
22 Q. And you make that note on the disclaimer  
23 piece of paper?  
24 **A. Yeah.**

1 **A. For probably two months.**  
2 Q. And then you throw them away?  
3 **A. Yes.**  
4 Q. Do you make a notes on the Board packets  
5 during the meeting?  
6 **A. Just like dates of the next committee**  
7 **meeting or something like that. Then when I get**  
8 **home I have a great pig piece of calendar paper on**  
9 **my desk and I write it on that.**  
10 Q. So, apart from noting dates you don't write  
11 anything else on your Board packet?  
12 **A. No, believe me I have all I can do to run**  
13 **the meeting.**  
14 Q. Well, that's an interesting question, did  
15 you keep notes before you became Board president on  
16 your Board packet or in any other form?  
17 **A. No.**  
18 MR. GOSSELIN: He has all he  
19 can do listening to the meeting, too.  
20 MR. ALLINGHAM: Well,  
21 Mr. Gosselin, I will call for production of  
22 the disclaimer page with whatever notes  
23 exist on it. I think that's called for by  
24 the production request.

20 (Pages 74 to 77)

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1 MR. GOSSELIN: That one you  
2 don't even need to send a letter to me.  
3 If you can grab that we will produce it.  
4 Do you remember the disclaimer, do you know  
5 what it says?  
6 **A. Uh-hum.**  
7 MR. GOSSELIN: I'll produce the  
8 paper, don't worry about.  
9 Q. Do you live a long way from Selbyville,  
10 from the Selbyville School, what used to be called  
11 the Selbyville School, where were are sitting today?  
12 **A. Ten to 15 miles.**  
13 MR. GOSSELIN: Just off the  
14 record.  
15 Q. Is it possible to have it delivered down  
16 here tomorrow or something like that?  
17 **A. I can bring it to you tomorrow.**  
18 MR. GOSSELIN: I don't want to  
19 have to bring him back.  
20 MR. ALLINGHAM: I don't either,  
21 and I don't think I have to ask Mr.  
22 Bireley questions about it if it's not  
23 too hard to get it here in some form that  
24 would obviate any possible need to ask any

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1 questions about it. I suspect what it is  
2 -- let me just ask you a couple of  
3 questions.  
4 Q. This piece of paper has the disclaimer  
5 printed on it, correct?  
6 **A. Yes.**  
7 Q. And it has some notes relating to who gave  
8 the prayer at some meetings, correct?  
9 **A. Yes.**  
10 Q. Other than that is there anything else on  
11 this piece of paper?  
12 **A. No.**  
13 Q. Is this piece of paper from time to time  
14 replaced by a new piece of paper?  
15 **A. Yes.**  
16 Q. That has the disclaimer on it?  
17 **A. Yes.**  
18 Q. I feel like I'm playing 20 questions now.  
19 And someone from the central office includes that  
20 disclaimer language in every package that you get,  
21 is that correct?  
22 **A. No. It's my responsibility to keep the**  
23 **disclaimer letter.**  
24 Q. And then if you don't have it you ask for

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1 it again? Why would someone from the central office  
2 send you a new copy of the disclaimer?  
3 **A. They don't, I make it.**  
4 Q. Oh, you make a new copy?  
5 **A. Yes.**  
6 Q. Okay, and throw away the old copy?  
7 **A. Yes.**  
8 Q. If you have an old copy why make a new  
9 copy?  
10 **A. Because I change the name on there of who**  
11 **was the person who said the prayer.**  
12 Q. So, you can use that disclaimer piece of  
13 paper to look back and see, to the extent you  
14 couldn't recall it independently, you can look back  
15 and see oh, yeah, I remember Dr. Hattier gave the  
16 prayer or Mrs. Mitchell gave the prayer last  
17 meeting, I should go to the next person?  
18 **A. Yes.**  
19 Q. Do you have in your head the order of those  
20 four people?  
21 **A. No.**  
22 Q. So, how do you know which one comes next?  
23 **A. I have the paper, you know with the names**  
24 **on it, if I've collected enough of them say for the**

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1 **last, I'm only looking at four months, four times.**  
2 Q. Yup.  
3 MR. ALLINGHAM: All right well  
4 request, Jason, I would like to have that  
5 piece of paper cause I'm not certain that  
6 I understand even now exactly what it says.  
7 MR. GOSSELIN: Right now do you  
8 have multiple pieces of paper going back a  
9 couple of months?  
10 **A. Probably one or two.**  
11 MR. GOSSELIN: Okay, but every  
12 month you print out a new disclaimer with a  
13 new name.  
14 **A. Either every month or every two months.**  
15 MR. ALLINGHAM: Whatever there is  
16 I'd like to see it.  
17 **A. Okay.**  
18 MR. GOSSELIN: You have got  
19 the disclaimer as a word file on your  
20 computer or something like that?  
21 **A. No, it's printed on a piece of paper and I**  
22 **just make a copy of it.**  
23 Q. Apart from the complaints that have been  
24 raised in this litigation, have there been any

21 (Pages 78 to 81)

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1 complaints during your tenure as a School Board  
2 member about the use of prayer during School Board  
3 meeting?  
4 **A. To me?**  
5 Q. To anyone that you are aware of?  
6 **A. No.**  
7 Q. During your entire as a school Board member  
8 including any meeting of the School Board, has any  
9 School Board member ever expressed an opinion that  
10 the practice of opening School Board meetings with  
11 prayer might violate the law?  
12 **A. Not that I'm aware of.**  
13 Q. Has the School Board consulted any law  
14 firms to research legal issues relating to School  
15 Board prayer?  
16 MR. GOSSELIN: Objection, don't  
17 answer that.  
18 MR. ALLINGHAM: On what ground?  
19 MR. GOSSELIN: Well, it calls for  
20 the I mean, I think that's sort of a, maybe  
21 that's a close call. Yes, he can answer  
22 questions about whether they've consulted  
23 law firms.  
24 MR. ALLINGHAM: I'm not going to

1 Q. Has the School Board contacted any law  
2 firms, or individual lawyers, I guess, for the  
3 purpose of obtaining information about School board  
4 prayer?  
5 **A. Yes.**  
6 Q. When was the first instance in which the  
7 School Board made such a contact?  
8 **A. After the graduation ceremony at Sussex**  
9 **Central.**  
10 Q. In 2004?  
11 **A. Yes.**  
12 Q. And do you know the names of the firms or  
13 individual lawyers whom the School Board contacted?  
14 **A. Mr. Neuberger.**  
15 Q. Any others?  
16 **A. No.**  
17 Q. Who contacted Mr. Neuberger?  
18 **A. Mr. Helms.**  
19 Q. Did the Board authorize Mr. Helms to  
20 contact Mr. Neuberger?  
21 **A. Not that I'm aware of.**  
22 Q. So, Mr. Helms contacted Mr. Neuberger on  
23 his own?  
24 **A. Yes.**

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1 go back through all the substantive  
2 questions that I had yesterday. I'm  
3 assuming and if you can confirm this on the  
4 record that you would make the same  
5 instructions to Mr. Bireley that you made  
6 to Dr. Hattier yesterday?  
7 MR. GOSSELIN: Yes, my instruction  
8 is that you can answer questions about  
9 whether a lawyer was hired, the fact that  
10 consultations might have taken place, but  
11 not anything regarding the substance of  
12 what you said to a lawyer or lawyer that  
13 you were considering hiring. That's the  
14 instruction.  
15 MR. ALLINGHAM: So, we are going  
16 to go question by question, but we sort of  
17 have the ground rules, and I'm going to try  
18 to observe those ground rules, on the  
19 assumption that I'm not going to re-ask all  
20 the questions that you would object to  
21 again, if you will represent that you would  
22 make the same instructions.  
23 MR. GOSSELIN: I make that  
24 representation.

1 Q. Do you know precisely when that took place?  
2 **A. No.**  
3 Q. Did Mr. Helms subsequently report on the  
4 substance of his conversation with Mr. Neuberger to  
5 the Board?  
6 **A. He got Mr. Neuberger to come and visit us.**  
7 Q. Do you know when that took place?  
8 **A. Not exactly.**  
9 Q. Was it the summer of 2004?  
10 **A. It was after the graduation ceremony, yes.**  
11 Q. Was it before the commencement of the next  
12 academic year?  
13 **A. Yes, I'm pretty sure it was.**  
14 Q. So, sometime during the summer of 2004?  
15 **A. Yes.**  
16 Q. Do you know whether Mr. Neuberger's visit  
17 to the Board is reflected in the minutes of the  
18 Board meeting?  
19 **A. I believe, if I am not mistaken that this**  
20 **was a special Board meeting, it wasn't a regular**  
21 **Board meeting.**  
22 Q. Okay. Do you know whether the minutes of  
23 that meeting reflect Mr. Neuberger's attendance?  
24 **A. I thought it was.**

22 (Pages 82 to 85)

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1 Q. Did had a special Board meeting open with a  
2 prayer?  
3 **A. I don't believe it did.**  
4 Q. Why is that?  
5 **A. I know it's probably sounds strange but the**  
6 **prayer issue usually is on regular Board meeting.**  
7 **If we have a special Board meeting we don't do it.**  
8 Q. Why would your say that sounds strange?  
9 **A. Because we just have a rule, or I guess**  
10 **it's a past practice or whatever that we always have**  
11 **the prayer at the regular Board meetings but no**  
12 **other.**  
13 Q. And when you say the regular Board meetings  
14 those are the regular meetings at which the public  
15 is present?  
16 **A. Yes, once a month.**  
17 Q. And is that regular practice it's not just  
18 today's practice or 2004's regular practice, it's  
19 the regular practice that goes back in time as far  
20 as your tenure on the Board extends, correct?  
21 **A. Yes.**  
22 Q. And is that because -- is the distinction  
23 between public meetings where prayers are offered  
24 and private meetings where prayers are not offered,

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1 is there any distinction other than that the public  
2 is present at those regularly scheduled public  
3 meetings?  
4 **A. Sometimes there is public at special**  
5 **meetings, too.**  
6 Q. Oh, and even if there is public at the  
7 special meetings you don't offer a pray?  
8 **A. That's correct.**  
9 Q. Is there any distinction from your point of  
10 view, just as an individual Board member, between a  
11 special meeting at which the public is present and a  
12 regular meeting at which the public is present that  
13 would lead to pray at the latter but not at the  
14 former?  
15 **A. Except it's always the way that it's been**  
16 **done.**  
17 Q. How often does the Board, just an estimate  
18 over your 30 years of tenure, how often does the  
19 Board call special Board meetings?  
20 **A. Two to three a year maybe.**  
21 Q. And how often does the public attend  
22 special Board meetings?  
23 **A. I'm not sure.**  
24 Q. Not very frequently?

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1 **A. I wouldn't say not all three of them. Say**  
2 **if we do two or three a year, say not all three. It**  
3 **depends on what the issue is.**  
4 Q. In this litigation we have had the  
5 opportunity to look at the minutes of Board  
6 meetings, and I'll represent to you that since the  
7 adoption of Policy BDA.1, the School Board Prayer  
8 Policy on October 19, 2004, since that date there  
9 have been at least 17 special Board meetings over  
10 the course of that two year period.  
11 So, that's eight to nine per year. Has the  
12 incidents of special Board meetings increased in  
13 recent years?  
14 **A. The difference between what I'm talking**  
15 **about and what you're talking about is we have a**  
16 **special Board meeting the we interview for**  
17 **personnel, I'm not talking about that. I'm talking**  
18 **about issues other than hiring of personnel that we**  
19 **have a special Board meeting for.**  
20 Q. Okay, so I can think of it as two  
21 categories of special meetings, one is a category  
22 which is limited to hiring personnel for the  
23 district?  
24 **A. Okay.**

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1 Q. Then I should be thinking then there is  
2 category of special meeting for everything else?  
3 **A. Yes.**  
4 Q. Even it's the everything else type meeting  
5 that comes two or three times a year?  
6 **A. Yes, I would say so.**  
7 Q. I assume that the personnel special  
8 meetings there are no public present?  
9 **A. That is true.**  
10 Q. At the other kinds of special meetings  
11 sometimes the public is present and sometimes there  
12 is nobody from the public there?  
13 **A. Yes.**  
14 Q. To come back to Mr. Neuberger, there is a  
15 special Board meeting on August 23, 2004 that was  
16 addressed in large part to the issue of prayer in  
17 the schools. I'll show you the minutes, what  
18 portion of the minutes that we have in a little  
19 while. It that the meeting and to place this in  
20 time, the next day, August 24, 2004, was the meeting  
21 at which many hundreds of people showed up. Was it  
22 the August 23 special meeting, the day before the  
23 big meeting, at which Mr. Neuberger showed up at the  
24 Board?

23 (Pages 86 to 89)

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1 **A. I don't think so.**  
2 Q. Was it before or after that August 24th big  
3 meeting?  
4 **A. If memory serves me correctly it was after.**  
5 Q. So, that's helpful, thanks. Other than  
6 Mr. Neuberger did the Board or the district contact  
7 any other lawyer or law firm to investigate issues  
8 relating to School Board prayer?  
9 **A. I believe that Mr. Walls, I think it's the**  
10 **Alliance Defense Fund, I think he had some**  
11 **conversation with them, but the Board never met with**  
12 **anyone from them.**  
13 Q. How did you find out about Mr. Walls'  
14 contacts with the Alliance Defense Fund?  
15 **A. He told us that he had done it, that's when**  
16 **he was president.**  
17 Q. Did the Board authorize Mr. Walls to  
18 contact the Alliance Defense Fund?  
19 **A. Not that I'm aware of.**  
20 Q. So, he did that on his own?  
21 **A. Yes.**  
22 Q. Other than Mr. Neuberger and the Alliance  
23 Defense Fund, did the Board or the district contact  
24 any lawyers for the purpose of investigating the

1 Q. He's with the Morse James firm?  
2 **A. I'm not sure.**  
3 Q. It's okay if you don't know?  
4 **A. It's a Delaware attorney.**  
5 Q. Got you. Mr. Williams was retained by the  
6 Board in connection with its dispute with its  
7 insurer, correct?  
8 **A. Yes.**  
9 Q. So that took place after February of 2006?  
10 **A. Yes.**  
11 Q. Quite a long time after the adoption of the  
12 School Board Prayer Policy?  
13 **A. Yes.**  
14 Q. Did the Board ever consult with either John  
15 Cafferty or John Balliger on the issue of School  
16 Board prayer?  
17 **A. You mean before they came to work for us or**  
18 **work with us?**  
19 Q. Before or after they came to work with you?  
20 **A. I don't think so. I think they were**  
21 **presented to us by the insurance company.**  
22 Q. Did Mr. Balliger and Mr. Cafferty represent  
23 the School District and the School Board?  
24 **A. Yes.**

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1 issue of School Board prayer?  
2 **A. I don't think so.**  
3 Q. Did the Board have a regular Board lawyer?  
4 **A. Yes.**  
5 Q. In the year of 2004?  
6 **A. Yes, excuse me.**  
7 Q. Who was that?  
8 **A. Mr. Griffin, James Griffin.**  
9 Q. Did the Board consult with Mr. Griffin on  
10 the issue of School Board prayer?  
11 **A. Yes.**  
12 Q. And when did the first, when did the Board  
13 first consult with Mr. Griffin on that issue?  
14 **A. Some time after the graduation.**  
15 Q. In terms of its consultation with  
16 Mr. Griffin did that take place before or after the  
17 big meeting on August 24th?  
18 **A. If memory serves me correctly that was**  
19 **afterwards, after too.**  
20 Q. Okay. So we've identified Mr. Neuberger,  
21 the Alliance Defense Fund and Mr. Griffin, any other  
22 lawyers that were consulted by the district on the  
23 issue of School Board prayer?  
24 **A. Maybe David Williams.**

1 Q. Did the School Board consult with  
2 Mr. Balliger and Mr. Cafferty on the issue of School  
3 Board prayer?  
4 **A. Yes.**  
5 Q. And did that consultation take place before  
6 or after the big August 24th meeting?  
7 **A. That was after.**  
8 Q. Was that before or after adoption of the  
9 School Board Prayer Policy on October 19, 2004?  
10 **A. If I'm not mistaken I think they had input**  
11 **into that.**  
12 MR. ALLINGHAM: Okay, we are going  
13 to change the tape so we will take a break.  
14 MS. DUPHILY: We are going off  
15 the record at approximately 11:09 a.m..  
16 (WHEREUPON a brief recess was  
17 taken)  
18 MS. DUPHILY: We are back on the  
19 record at approximately 11:17 a.m..  
20 Q. Mr. Bireley, I think the last answer was  
21 clear, but I take it from that that Messers Cafferty  
22 and Balliger provided advice to the Board on the  
23 School Board prayer policy prior to its adoption on  
24 October 19, is that correct?

24 (Pages 90 to 93)

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1 **A. I think so.**  
2 Q. Of Mr. Neuberger -- are you familiar with  
3 the Rutherford Institute?  
4 **A. I know who they are.**  
5 Q. Did you understand that the Rutherford  
6 Institute and Mr. Neuberger were affiliated in some  
7 way?  
8 **A. Yes.**  
9 Q. Of Mr. Neuberger, the Rutherford Institute,  
10 the Alliance Defense Fund, Mr. Griffin and Messers  
11 Cafferty and Balliger, would you identify the  
12 individuals or organizations which the Board  
13 actually retained for purposes of providing advice  
14 in connection with the School Board prayer?  
15 **A. Cafferty and Balliger.**  
16 Q. Am I correct that the Board did not retain  
17 Mr. Neuberger?  
18 **A. That's correct.**  
19 Q. And the Board did not retain the Rutherford  
20 Institute?  
21 **A. That's correct.**  
22 Q. The Board did not retain the Alliance  
23 Defense Fund?  
24 **A. Correct.**

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1 Q. Now, we come to Mr. Griffin did the Board  
2 retain Mr. Griffin for purposes of providing advice  
3 on School Board prayer issues?  
4 **A. Mr. Griffin was our regular attorney.**  
5 Q. When Mr. Griffin provided the advice that  
6 he did to the Board on School Board prayer issues,  
7 it was your expectation that he would be compensated  
8 for that time, correct?  
9 **A. Through his regular way.**  
10 Q. Does he have, does Mr. Griffin charge by  
11 the hour on an annual retainer basis?  
12 **A. I believe he charges by the hour. I'm not**  
13 **positive.**  
14 Q. Okay. At all events it was your  
15 expectation as a Board member that Mr. Griffin would  
16 be compensated somehow for the advice he was giving  
17 on the School Board prayer issue?  
18 **A. I would think so.**  
19 Q. All right, at any time, this is a little  
20 bit complicated question, at any time since you have  
21 been a Board member has a school Board member ever  
22 offered a prayer that would have violated the School  
23 Board Prayer policy that was adopted in October, on  
24 October 19, 2004? Do you understand the question?

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1 **A. I understand what you said, but I don't**  
2 **know how they would have violated it.**  
3 Q. Let me ask it a different way which maybe  
4 would help. If the School Board Prayer Policy had  
5 been in place beginning before you were elected to  
6 the School Board for the first time, do you recall  
7 any prayer offered by a Board member that would have  
8 violated that policy?  
9 **A. Not that I'm aware of.**  
10 Q. Okay. So, you're not aware of any prayer  
11 that has ever been offered by a School Board member  
12 that did not comply -- I'm going to withdraw the  
13 question, and start again, I want to give you the  
14 policy so you have it in front of you.  
15 I have handed you a copy of what previously  
16 was marked as Plaintiff's Exhibit 9, which is the  
17 School Board Prayer Policy. First of all, is this  
18 the School Board Prayer Policy?  
19 **A. Yes.**  
20 Q. It was adopted as it says down in the lower  
21 left-hand corner on October 19, 2004?  
22 **A. Yes.**  
23 Q. Paragraph three says, "That the opportunity  
24 to open Board meetings with a prayer shall not be

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1 used or exploited to proselytize, advance or convert  
2 anyone or to derogate or otherwise disparage any  
3 particular faith or belief." Am I correct in  
4 understanding from your previous answer that it's  
5 your belief that on no occasion has any prayer ever  
6 been offered by a Board member at a Board meeting  
7 that would be a proselytizing prayer?  
8 **A. Not that I'm aware of.**  
9 Q. Or that would have sought to advance any  
10 particular faith or belief?  
11 **A. Not that I'm aware of.**  
12 Q. The language of paragraph three reads,  
13 "Such opportunity," we can agree that would be the  
14 opportunity to open meetings with a prayer?  
15 **A. Yes.**  
16 Q. Or a moment of silence?  
17 **A. Yes.**  
18 Q. "Such opportunity shall not be used or  
19 exploited to proselytize," what do you understand  
20 proselytize to mean?  
21 **A. Like to convert or say that a particular**  
22 **issue that they believed in is what everybody should**  
23 **believe in.**  
24 Q. The next clause reads, and I'm going to

25 (Pages 94 to 97)

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1 just pick up the earlier language, "Such opportunity  
2 shall not be used or exploited to advance or convert  
3 anyone." Do you see that?  
4 **A. Yes.**  
5 Q. It's easy to understand what such  
6 opportunity shall not be used or exploited to  
7 convert anyone means. What do you understand the  
8 meaning to be of the use of the word advance in that  
9 clause? I read it to be such opportunity shall not  
10 be used or exploited, advance anyone, anyone being  
11 the object of the word advance, is that how you read  
12 it?  
13 **A. Yes.**  
14 Q. What does that mean?  
15 **A. That because one person is saying a prayer**  
16 **that that's not suppose to mean that that particular**  
17 **person's issues are put upon anyone else, it's just**  
18 **his own words.**  
19 Q. So, I am going to give an example, because  
20 it's the typical practice, if a Christian prayer is  
21 offered by a person who is a Christian that should  
22 not be taken to advance that person ahead of other  
23 people, is that what you're saying?  
24 **A. That because one person is giving a**

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1 **Christian prayer doesn't mean that anyone else in**  
2 **the audience might not or would have a right to**  
3 **think differently than what he does, he or she.**  
4 Q. Well, whether this policy exists or not  
5 every person in the audience has the right to think  
6 whatever they want to think under our laws, don't  
7 they?  
8 **A. Yes.**  
9 Q. And they have the right to think whatever  
10 they want to think, even if someone offers a  
11 proselytizing prayer, isn't that correct?  
12 **A. Yes.**  
13 Q. So, why is paragraph three necessary?  
14 **A. To be very honest with you the answer that**  
15 **I can give you is because it was recommended to be**  
16 **in there by the attorneys who helped us put this**  
17 **policy together.**  
18 Q. What attorneys helped you put this policy  
19 together?  
20 **A. The only two that I am aware of that did it**  
21 **was Mr. Cafferty and Balliger, and I think that at**  
22 **one time that Mr. Neuberger had some, he had some**  
23 **insight into this. Whether or not that he actually**  
24 **gave something that he wanted in there or whatever**

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1 **I'm not sure.**  
2 Q. Who drafted this policy?  
3 **A. It was done by the committee which**  
4 **Mr. Walls was the chairman.**  
5 Q. Do you know what Mr. Walls used at the  
6 basis — do you know who actually put pen to paper  
7 or fingers to keyboard and drafted this?  
8 **A. No, I don't know who did that.**  
9 Q. Were Mr. Cafferty and Mr. Balliger retained  
10 by the Board after the Board was sued?  
11 **A. I don't think that the Board ever retained**  
12 **those two. I think they were retained by the**  
13 **insurance company. I don't know that we even had**  
14 **any choice in the matter.**  
15 Q. Well, there is a lot imbedded in that  
16 answer, but let me just focus on the timing part.  
17 whoever retained Messers Balliger and Cafferty, did  
18 that retention come before or after the Board was  
19 sued?  
20 **A. I'm not sure.**  
21 Q. Okay. Am I correct that your best  
22 recollection is that the text of this policy came  
23 from the policy committee?  
24 **A. Yes.**

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1 Q. Correct?  
2 **A. Yes.**  
3 Q. And you don't have any information about  
4 where the policy committee, what formed the basis  
5 for the policy committee's drafting of the text of  
6 this policy?  
7 **A. That is true.**  
8 Q. When the policy was presented to the full  
9 Board did you ask the policy committee what had been  
10 the basis for the text that was presented to you?  
11 **A. No, I did not.**  
12 Q. Why not?  
13 **A. Because I read it and it appeared that wit**  
14 **this policy or any other policy we always run it by**  
15 **the attorneys before we are allowed to see it, and**  
16 **it was like something that was out of my domain, I**  
17 **don't have the legal background to ask questions**  
18 **like that, so I assumed that this was the way that**  
19 **we should go.**  
20 Q. Did the full the Board make the decision to  
21 refer to the policy committee the issue of whether  
22 to adopt the policy on School Board prayer?  
23 **A. That's the procedure.**  
24 Q. So, there was a point at which the full

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1 Board said should we adopt the School Board Prayer  
2 Policy or not?  
3 **A. I would say probably, yes.**  
4 Q. And do you know when that discussion or  
5 consideration occurred?  
6 **A. No.**  
7 Q. Some time after graduation?  
8 **A. Yes.**  
9 Q. Sometime before October 1th9?  
10 **A. Yes.**  
11 Q. Did that determination occur before or  
12 after the big meeting on August 24th?  
13 **A. Are we talking about August the 24th of**  
14 **2004.**  
15 Q. Yes, sir.  
16 **A. I think it was after that, but I'm not**  
17 **positive, but I think so.**  
18 Q. Back to the text of paragraph three. Am I  
19 correct that the Board intends that the prayer  
20 opportunity should not be used to advance any  
21 particular faith?  
22 **A. Yes.**  
23 Q. And when you say advance any particular  
24 faith, what do you mean by that?

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1 **A. If a person is a Christian it should not**  
2 **appear that the Christian prayer is the only one**  
3 **there is. It's just from the individual.**  
4 Q. Fair enough. That could be accomplished I  
5 suppose by saying before whatever you say as a Board  
6 member I am not intending by offering this prayer to  
7 suggest that this is the only appropriate prayer or  
8 that the faith in which this prayer is offered is  
9 the only appropriate faith?  
10 **A. I would agree with that.**  
11 Q. That's kind of the thrust that you are  
12 trying to get at in this policy?  
13 **A. Uh-hum. If I can say something, you want**  
14 **to know what I read before every Board meeting, is**  
15 **paragraph one and paragraph three.**  
16 Q. Oh, good, we were going to come to that,  
17 but we might as well address it now. So, the words  
18 on that disclaimer page that you have --  
19 **A. Yes.**  
20 Q. -- are the words of paragraph one and  
21 paragraph three?  
22 **A. Yes, that's the disclaimer that I read at**  
23 **every meeting.**  
24 Q. So, at every meeting, you say, "In order to

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1 solemnify its proceedings, the Board of Education  
2 may choose to open its meetings with a prayer or  
3 moment of silence, all in accord with the freedom of  
4 conscience of the individual adult Board member.  
5 Such opportunity shall not be used or exploited to  
6 proselytize, advance or convert anyone or to  
7 derogate or otherwise disparage any particular faith  
8 or belief?"  
9 **A. I'm sorry, that is not the paragraph, I'm**  
10 **sorry. It's one and four.**  
11 Q. Got you.  
12 **A. After I read paragraph one I then read**  
13 **paragraph four. But when it came to me, Mr. Walls**  
14 **passed it on down to me after he became.**  
15 Q. Yes, sir?  
16 **A. That's what this is, when I talk about the**  
17 **disclaimer it's paragraph one and paragraph four.**  
18 Q. And you are confident that you read the  
19 text of paragraph one and paragraph four at every  
20 Board meeting?  
21 **A. At every Board meeting.**  
22 Q. Every Board meeting at which prayer is  
23 offered?  
24 **A. I'm not going to say that I've never**

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1 **forgotten to do it or something like that but for**  
2 **the most part the answer is yes.**  
3 Q. Your intention anyway is to ready paragraph  
4 one and paragraph four prior to the offering of any  
5 prayer at a Board meeting?  
6 **A. Yes.**  
7 Q. Now, the legality of the School Board  
8 Prayer Policy, I can easily understand why you would  
9 not it's my bailiwick and I'm going to rely on the  
10 lawyers, but the decision whether to have a policy  
11 on School Board prayer and the decision whether to  
12 offer an opportunity to Board members to pray before  
13 meetings is certainly within your bailiwick, isn't  
14 it?  
15 **A. Yes.**  
16 Q. And when Mr. Walls presented the text of  
17 the School Prayer Policy to the Board, to the full  
18 Board, did you ask him where the text of the policy  
19 that relates to those generalized issues came from?  
20 **A. I did ask him?**  
21 Q. Yes.  
22 **A. No.**  
23 Q. Is that because you didn't care what the  
24 source was as long as it seemed okay to you?

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1 **A. After reading this and listening to him**  
2 **saying that this was recommended by the attorneys**  
3 **who we asked to do this, then I accepted it.**

4 Q. Okay. When Mr. Walls said, and by the way  
5 is the first time you saw the text of this School  
6 Board Prayer Policy at the first reading of this  
7 School Board Prayer Policy?

8 **A. Yes.**

9 Q. I'll represent to you that was at the  
10 September Board meeting of 2004, okay?

11 **A. Okay.**

12 Q. When Mr. Walls presented the text of this  
13 policy to you and told the Board that it had been  
14 recommended by the attorneys, did he identify the  
15 attorneys involved?

16 **A. No.**

17 Q. Did it matter to you which attorneys had  
18 recommended that this was appropriate?

19 **A. Again it was my assumption that it was from**  
20 **Mr. Cafferty and Mr. Balliger because they were they**  
21 **who were representing us at the time.**

22 Q. So, your best guess is that Mr. Cafferty  
23 and Mr. Balliger were representing the Board prior  
24 to the first reading of this policy?

1 also get a copy of the attachment from Mr. Helms via  
2 fax or any other means at any time?

3 **A. If I did I don't remember when it was, but**  
4 **I am familiar with this, I have seen this.**

5 Q. Fair enough, that's my next question, have  
6 you seen the attachment?

7 **A. Yes.**

8 Q. In what context did you see the attachment?

9 **A. If I am not mistaken I believe that this**  
10 **was given to us either in a Board packet or at a**  
11 **Board meeting.**

12 Q. Who gave it to you?

13 **A. Well, if it was in the Board packet it came**  
14 **through central office. If it was at a Board**  
15 **meeting it could have been given to us by either Mr.**  
16 **Helms or Mr. Walls, either one, I guess.**

17 Q. Okay. Did the Board review and consider  
18 the content of PX34?

19 **A. I know I read it. Whether or not that any**  
20 **formal, anything formal at all was involved in it, I**  
21 **don't know.**

22 Q. Did anybody make a presentation on this  
23 document?

24 **A. I don't remember that they did.**

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1 **A. I certainly thought so.**

2 MR. GOSSELIN: We can go back and  
3 try to find out exactly the day that  
4 Balliger and Cafferty got involved and if  
5 it's inconsistent with what Mr. Bireley  
6 remembers we can clarify that afterward if  
7 you want us to so you don't have to spend  
8 -- I mean you can do whatever you want  
9 but I don't see that as a controversial  
10 issue, and we want to get the right  
11 information out there.

12 MR. ALLINGHAM: I'm going to mark  
13 as Plaintiff's Exhibit 34 a document  
14 bearing Bates numbers BPD713 through 718.

15 (WHEREUPON Plaintiff's Exhibit 34  
16 was marked for identification.)

17 Q. Now, the cover page of PX43 is what looks  
18 like a fax cover page, handwritten from Reggie Helms  
19 to Harvey Walls, subject proposed policy, sheets six  
20 including cover, which conforms to the number of  
21 pages in this exhibit. There's a fax line at the  
22 top of the page that reflects that it was sent on  
23 September 2, 2004 at 3:28 in the afternoon.

24 My first question to you, sir, is did you

1 Q. So, your best recollection is that either  
2 in a the Board package or as a handout from  
3 Mr. Helms or Mr. Walls individual Board members,  
4 individual Board members got a copy of PX34?

5 **A. I believe that's true.**

6 Q. Did anybody say why you were being given  
7 this material?

8 **A. Other than the fact that they wanted us to**  
9 **review it.**

10 Q. At the point at which this material was  
11 distributed to the full Board, had the matter of the  
12 School Board Prayer Policy be referred to the policy  
13 committee by the full Board?

14 **A. I'm not sure.**

15 Q. Let me show you what's previously been  
16 marked as Hattier Exhibit 13, Plaintiff's Exhibit  
17 13, I apologize.

18 MR. ALLINGHAM: I'm assuming Jason  
19 that you have ones --

20 MR. GOSSELIN: I have everything  
21 that you marked yesterday.

22 Q. Okay, good. Just for a couple of  
23 preliminaries, Mr. Bireley. These purport to be the  
24 minutes of a special meeting of the Board of

28 (Pages 106 to 109)

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1 Education on August 23, 2004 and they are signed by  
2 Ms. Hobbs as secretary and superintendent. I'm  
3 going to talk about the portion that says redacted  
4 on the first page in a minute, but apart from that  
5 do you believe that these are the official minutes  
6 of the August 23 meeting?

7 **A. They appear to be.**

8 Q. I don't know if someone's hold you this,  
9 but redacted is a word lawyers use for taking out or  
10 masking certain portions of a document?

11 **A. Edited or something doesn't it.**

12 Q. It just means that it's intended to  
13 indicate take something has been removed. And your  
14 lawyers were the ones who removed it for reasons  
15 that we don't have to get into. Do you recall that  
16 there was a meeting on August 23, 2004 at the Sussex  
17 Central Middle School library, on the day preceding  
18 the big the Board meeting on August 24th?

19 **A. No, I don't remember but it's very  
20 possible.**

21 Q. Do you have any reason to doubt that such a  
22 meeting took place?

23 **A. No.**

24 Q. The participants in the meeting are not

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1 **been Mr. Griffin because he is listed as a visitor  
2 in attendance.**

3 Q. Okay. You went into executive session at  
4 7:01 and you came out at 11:15 so, it was about a  
5 four and a quarter hour session. Do you recall a  
6 lengthy session in executive session at the Sussex  
7 Central Middle School to get advice from your legal  
8 counsel regarding potential litigation?

9 **A. Again, I can't remember everything, but I  
10 have no reason to doubt that this says.**

11 Q. And I'm not trying to get at whether when  
12 it was exactly August 23, I'm trying to get at do  
13 you recall a very lengthy executive session in which  
14 you got advice from legal counsel about the School  
15 Board prayer and prayer issues?

16 **A. Yes.**

17 Q. And is it your belief based on the minutes  
18 that I put in front of you that that lengthy session  
19 involved advice from Mr. Griffin?

20 **A. Yes.**

21 Q. Now, if you look at PX13, which is the  
22 executive session minutes, you'll see down near the  
23 bottom of the first page, and this is the only  
24 substantive portion of the minute that we've been

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1 listed, but I'll represent to you in a document  
2 which we have also marked which is the of the  
3 non-executive portion of that meeting you were  
4 listed as an attendee at that meeting?

5 **A. I probably was.**

6 Q. Do you recall why you went into executive  
7 session?

8 **A. It has to be for certain reasons that by  
9 law that we're allowed to.**

10 Q. Let me now show you what we have marked as  
11 PX14. These are the minutes of the non-executive  
12 portion of that meeting, and you will see on the  
13 second page of PX14 that you were in attendance at  
14 the meeting?

15 **A. Okay.**

16 Q. The fourth heading on the first page of the  
17 minutes shows that you went into executive session  
18 immediately being after called to order to seek  
19 advice from legal counsel regarding potential  
20 litigation, do you see that?

21 **A. Yes.**

22 Q. Who was the legal counsel that you went  
23 into special session to talk to?

24 **A. Well, I'm going to say that it must have**

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1 given, it reflects, "During the discussion of this  
2 issue several Board members expressed that their  
3 constituents do not want the Board to change its  
4 practice of opening the meeting with a prayer. It  
5 was not felt that the decision could be made this  
6 evening regarding whether or not to change our past  
7 practice."

8 Do you recall that during that lengthy  
9 meeting about prayer issues with Mr. Griffin in  
10 attendance several board members expressed the view  
11 that their constituents did not want the Board to  
12 change its practice of opening the meetings with a  
13 prayer?

14 **A. Yes.**

15 Q. Can you identify for them those Board  
16 members who expressed that view?

17 **A. Not really, but I know -- I mean I would be  
18 afraid to tell you any particular names because I  
19 would miss one or something like that, but I know  
20 that it was discussed.**

21 Q. Did you express the view that your  
22 constituents did not want the Board to change its  
23 practice?

24 **A. Yes.**

29 (Pages 110 to 113)

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1 Q. How did you form the view that your  
2 constituents did not want the Board on change its  
3 practice?  
4 **A. Based on feedback that I had received from**  
5 **the community members.**  
6 Q. How did you get that feedback?  
7 **A. Well, either by them calling me on the**  
8 **telephone or, you know, seeing them in the public,**  
9 **something like that.**  
10 Q. When did you first start getting comments  
11 from the public, your constituents about this issue?  
12 **A. After the graduation ceremony there when it**  
13 **first hit the newspaper.**  
14 Q. And you began getting calls from your  
15 constituents?  
16 **A. Yes.**  
17 Q. You also had people come up to you on the  
18 street in effect and say we hope you will continue  
19 the Board prayer?  
20 **A. Yes.**  
21 Q. How many constituents would you say you had  
22 talked to by the time of the August 23 executive  
23 session?  
24 **A. Just, I guess ten or 15.**

1 any concern about expressing the view that the Board  
2 should not open its meetings with a prayer?  
3 **A. Please say that again.**  
4 Q. Would there be any reason why one of your  
5 constituencies might be afraid to call you and, you  
6 know, you really ought to jettison this School Board  
7 prayer?  
8 **A. That's possible.**  
9 Q. And an example of why they might be afraid  
10 occurred the very next day at the big Board meeting,  
11 is that right?  
12 **A. Yes.**  
13 MR. GOSSELIN: Objection, go  
14 ahead.  
15 Q. Isn't that correct?  
16 **A. Yes, that's possible, yes.**  
17 Q. Because what happened at the big Board  
18 meeting was that many comments were made that were  
19 intended to be intimidating, isn't that right?  
20 MR. GOSSELIN: Objection.  
21 Q. During the public comment, not from the  
22 Board members, but during the public commentary?  
23 MR. GOSSELIN: Objection.  
24 **A. I'm confused. He says that --**

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1 Q. Okay. When you spoke to your fellow Board  
2 members in executive session did you say my  
3 constituents are in favor of continuing the  
4 practice, or did you say the constituents of mine  
5 that I've spoken to are in favor of continuing the  
6 practice?  
7 **A. I don't remember how I said that.**  
8 Q. You see the distinction that I'm drawing?  
9 **A. Yes, I do.**  
10 Q. How many constituents do you have in your  
11 district would you suppose?  
12 **A. Three, four, 5000.**  
13 Q. So, you said I'm sorry, three to 5000?  
14 **A. Three, four, 5000, somewhere in that**  
15 **neighborhood, I guess.**  
16 Q. At the time of this meeting you estimate  
17 that you had spoke to ten or 15 of them?  
18 **A. Probably no more than that.**  
19 Q. Did you have any concerns that that was not  
20 a representative sampling of your constituency?  
21 **A. The Only I can say is I had no one that**  
22 **called me and said that it should be anything other**  
23 **than that.**  
24 Q. And would you expect that people would have

1 MR. GOSSELIN: Unless I tell you  
2 don't answer you can answer it even though  
3 I have asserted an objection.  
4 **A. Okay, I'm sorry.**  
5 Q. Do you want me to repeat the question  
6 again?  
7 **A. Please.**  
8 Q. And the reason that you understand that a  
9 member of the public might be fearful about  
10 expressing a view in opposition to School Board  
11 prayer is the tenor of the comments during the  
12 public session at the August 24 Board meeting, is  
13 that correct?  
14 **A. Yes.**  
15 Q. Some of which were intended to be  
16 intimidating to opponents of School Board prayer?  
17 MR. GOSSELIN: Objection.  
18 **A. Yes.**  
19 Q. In fact the vast majority of the comments  
20 were intended be intimidating to opponents of School  
21 Board prayer, isn't that right?  
22 MR. GOSSELIN: Objection.  
23 **A. Probably so.**  
24 Q. Now, whoever the Board members were who

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1 expressed the view that their constituents did not  
2 want the Board to change their practice, did they  
3 draw the distinction that I raised with you, about  
4 did they say my constituents don't want a change, or  
5 the constituents that I talked said they don't want  
6 to change?  
7 **A. I would say that I heard that from other**  
8 **people, but I cannot tell you exactly who they were,**  
9 **because I wouldn't want to do that cause I don't**  
10 **know for sure, but yes, I did hear that from other**  
11 **Board members.**  
12 Q. And was it your understanding what they  
13 were telling you is that the constituents that I  
14 talked to don't want us to change our practice?  
15 **A. I could assume that, yes, I would.**  
16 Q. You didn't think that people had taken a  
17 poll of their constituency?  
18 **A. No.**  
19 Q. Did anybody say some of my constituents  
20 even contacted me to oppose School Board prayer?  
21 **A. I don't remember that.**  
22 Q. Up to this point you had no constituents  
23 speak to you in opposition to School Board prayer?  
24 **A. I'd have to clarify that.**

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1 Q. Sure.  
2 **A. I had a call from Mrs. Dobrich after the**  
3 **graduation at that time.**  
4 Q. Yes.  
5 **A. She was under the opinion that I was the**  
6 **Board president.**  
7 Q. Yes.  
8 **A. And I told her that I wasn't, and that**  
9 **Mr. Walls was. Yes, she did call me and tell me how**  
10 **she felt about what happened the night of the**  
11 **graduation.**  
12 Q. And Mrs. Dobrich is one of your  
13 constituents?  
14 **A. No.**  
15 Q. So this was --  
16 **A. But you said has anybody. Basically in our**  
17 **district we are divided into five districts, but if**  
18 **you are a Board member you are really responsible**  
19 **for all five districts in one way or another, but**  
20 **when she called me I listened to her and I talked to**  
21 **her.**  
22 Q. But you understood what was being expressed  
23 in these minutes as individual Board members saying  
24 in my district of the district?

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1 **A. I would say that's correct.**  
2 Q. My constituents want us to keep going?  
3 **A. Yes.**  
4 Q. Did Mrs. Dobrich raise the issue of School  
5 Board prayer during the call to you?  
6 **A. No.**  
7 Q. And you said, I assume you were respectful  
8 to Mrs. Dobrich?  
9 **A. I hope so.**  
10 Q. You said I'm not the president you should  
11 speak to Mr. Walls?  
12 **A. Yes.**  
13 Q. Did Mrs. Dobrich ask how she could have an  
14 opportunity to speak to the Board on the issue?  
15 **A. I believe she did.**  
16 Q. What did she say?  
17 **A. I believe like I should have told her just**  
18 **like I would tell anyone else, they should call**  
19 **central office and talk to the superintendent and**  
20 **request permission to be on our agenda.**  
21 Q. When you say you should have told her that,  
22 that what you expect that you would have told her  
23 but you don't have an independent recollection?  
24 **A. Yes.**

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1 Q. You told me earlier that you told her to  
2 call Mr. Walls?  
3 **A. Well, she wanted to talk to the Board**  
4 **president.**  
5 Q. Okay, so you are confident that you told  
6 her to call Mr. Walls because he was the Board  
7 president?  
8 **A. Yes.**  
9 Q. And you think you probably also said that  
10 if you want to speak to the Board call central  
11 office?  
12 **A. Because that's our practice, yes. I hope I**  
13 **did that.**  
14 Q. Did you ever hear that Mrs. Dobrich did in  
15 fact contact central office?  
16 **A. Yes.**  
17 Q. Did you ever hear what they told her?  
18 **A. No.**  
19 Q. Did you ever hear that she had difficulty  
20 getting her issue on the agenda?  
21 **A. I heard about that later on, yes.**  
22 Q. Who did you hear about that from?  
23 **A. Like scuttlebutt, but it came to me much**  
24 **later even after the meeting at Frankford**

31 (Pages 118 to 121)

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1 **Elementary.**  
2 Q. Tell me everything you recall about this  
3 scuttlebutt?  
4 **A. That she had tried to do what, you know**  
5 **that I had suggested that she do, and she didn't**  
6 **feel that she was successful in getting it done.**  
7 Q. And who did you hear that from?  
8 **A. I'm not sure, I'm really not.**  
9 Q. Did you investigate whether that concern  
10 was true, because you wouldn't like it if somebody  
11 went to the central office and had difficulty  
12 getting their issue on an agenda, would you?  
13 **A. Yes.**  
14 Q. You did investigate?  
15 **A. Yes.**  
16 Q. What did you find out?  
17 **A. I asked Mrs. Hobbs about it.**  
18 Q. What did she say?  
19 **A. She had told me that she had called her.**  
20 Q. Mrs. Dobrich had called her?  
21 **A. She said that I have talked to**  
22 **Mrs. Dobrich.**  
23 Q. Yes, sir, and did she say that she had  
24 agreed to put the issue on the agenda?

1 Q. The next sentence of PX13, which is the  
2 executive session minutes says, "It was not felt  
3 that a decision could be made this evening regarding  
4 whether or not to change our past practice." I take  
5 it that it was not felt means it was not felt by the  
6 Board members, correct?  
7 **A. Yes.**  
8 Q. And it was not felt that a decision could  
9 be made this evening regarding whether or not to  
10 change our past practice, what was it that the Board  
11 members needed before they could make a decision  
12 about whether or not to change their past practice?  
13 **A. Advice from an attorney.**  
14 Q. The minutes PX14 say that the purpose of  
15 going into executive session which then lasted four  
16 hours and 15 minutes, was to seek advice from our  
17 legal counsel on this issue, right?  
18 **A. Yes.**  
19 Q. Was there something wrong with the four  
20 hours and 15 minutes you had already gotten on the  
21 issue?  
22 **A. I would say that it was like they wanted a**  
23 **second opinion.**  
24 Q. And you say it was like they wanted a

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1 **A. I'm not sure that she told me that. I know**  
2 **that she told me specifically that she had talked to**  
3 **Mrs. Dobrich.**  
4 Q. And what did she say, did she tell you the  
5 substantiate of the conversation?  
6 **A. It was concerning how Mrs. Dobrich felt**  
7 **about the issues of what went on during the**  
8 **graduation.**  
9 Q. What did Mrs. Hobbs tell you that she told  
10 Mrs. Dobrich?  
11 **A. Well, I don't know that she did tell me**  
12 **what she told Mrs. Dobrich, she just had a**  
13 **conversation with her.**  
14 Q. Did Mrs. Hobbs tell you how the  
15 conversation ended up?  
16 **A. No. If she did, I don't remember.**  
17 Q. Did Mrs. Hobbs assure you that Mrs. Dobrich  
18 was advised that she could speak to the Board about  
19 this issue?  
20 **A. Not specifically I don't think she did.**  
21 Q. Did she tell you, that she Mrs. Hobbs  
22 agreed to put the issue on the agenda for the Board  
23 meeting?  
24 **A. I thought she did.**

1 second opinion, is the they just generally the Board  
2 members, or was there a group that was urging that  
3 the Board get a second opinion?  
4 **A. I would say it was the Board members.**  
5 Q. All of them.  
6 **A. I would say so.**  
7 Q. Yes, sir.  
8 **A. I don't have any first hand knowledge that**  
9 **anyone did not want that.**  
10 Q. Can you think of any instance which the  
11 Board had in the past received advice from  
12 Mr. Griffin and then decided to get a second  
13 opinion?  
14 **A. Yes.**  
15 Q. Give me an example?  
16 **A. I can't give you a specific example but it**  
17 **happens.**  
18 Q. And is that because the Board doesn't like  
19 the advice that it gets from Mr. Griffin?  
20 **MR. GOSSELIN: Objection.**  
21 Q. You may answer.  
22 **A. We may not agree with what he advised, yes**  
23 **that's true.**  
24 Q. Is that what happened in this instance?

32 (Pages 122 to 125)

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1 **A. I think so.**  
2 MR. GOSSELIN: I don't want to  
3 interfere with your questioning here. I  
4 think that at least I thought your intent  
5 just to just sort of find out the process.  
6 I think you are starting to tread into  
7 territory where you are trying to get at  
8 what the advice was that Mr. Griffin gave,  
9 and obviously we object to that. I'm  
10 putting that out on the record because I  
11 want to just remind both you and the  
12 witness what we agreed were going to be the  
13 ground rules for this line of questioning.  
14 MR. ALLINGHAM: Yeah, it's a  
15 little bit delicate. The ground rule was  
16 that you and I would agree to disagree  
17 about whether I am entitled to ask  
18 questions about the substance of the  
19 advice. That you and I would agree that,  
20 and you would make the representation  
21 that if I asked the same questions I asked  
22 of Dr. Hattier, you would make the same  
23 instructions so I don't need to do it again  
24 with Mr. Bireley.

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1 MR. GOSSELIN: I don't know what  
2 kind of letter I'm going to get tomorrow  
3 and what you are going to be requesting,  
4 but I don't want there to be any argument  
5 that we have to give you, you know, written  
6 documents from Mr. Griffin or anybody else  
7 because somehow the attorney/client  
8 objection has been waived.  
9 I mean Mr. Bireley just gave an  
10 answer that I think it's -- I don't know if  
11 it was responsive to your question, if your  
12 question was intended to elicit that  
13 response I would have objected to it and  
14 instructed him not to answer, and I didn't,  
15 and I don't want that to be deemed by you  
16 as some sort of a waiver, because if so I  
17 think we can cut off the whole line of  
18 questioning generally.  
19 The judge issued an order here  
20 saying that we have to produce documents  
21 from the executive committee meetings to  
22 the extent that they don't implicate  
23 attorney/client privilege, that's why we  
24 gave that. And you know, it's difficult to

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1 find out exactly where the line is to be  
2 drawn in a case like this, and I think we  
3 have drawn it that you can get the general  
4 information about when the discussions took  
5 place, the overall subject matter of the  
6 discussions, but anything that goes to the  
7 specific substance of the discussions  
8 obviously I object to.  
9 MR. ALLINGHAM: I don't think it's  
10 necessary to take positions on a deposition  
11 record which take times of Mr. Bireley. I  
12 thought that had an agreement. I thought  
13 that we put our agreement on the record in  
14 this transcript, we will abide by that  
15 agreement. I'm going on keep asking  
16 questions that I think were not posed to  
17 Dr. Hattier. If I think that they are  
18 appropriate, and if they are questions that  
19 were not posed to Dr. Hattier it is our  
20 position that you are obligated to object,  
21 but the chips will fall where they may. We  
22 have whatever agreement we have.  
23 MR. GOSSELIN: Okay.  
24 MR. ALLINGHAM: Anticipating

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1 argument that haven't yet been made and  
2 making responsive arguments on the record  
3 is not an effective use of our time.  
4 MR. GOSSELIN: I am cautioning the  
5 witness, wait before you answer the  
6 question because I may be objecting and I  
7 may be instructing you not to answer.  
8 Q. Mr. Bireley, I would second that. I think  
9 it's important that you hear my full question before  
10 you answer, and I would give you the same advice,  
11 it's important for our record to give your attorney  
12 a chance to speak just a second before you respond,  
13 okay?  
14 **A. Okay.**  
15 Q. I was asking you about the second sentence  
16 portion of the executive session minutes. Was there  
17 anything else besides a second opinion that you  
18 needed in order to make a decision regarding whether  
19 or not to change your past practice?  
20 **A. Not that I am aware of.**  
21 Q. Was there an agreement at that meeting as  
22 to how the Board would go an about getting a second  
23 opinion? Was somebody assigned to get it, find a  
24 lawyer, what was the process to get that second

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1 opinion?  
2 **A. Usually it's through the administration the**  
3 **superintendent.**  
4 Q. As it your best recollection that the board  
5 members agreed to tell Mrs. Hobbs to find a lawyer  
6 to give the Board a second opinion on this issue?  
7 **A. To the best of my knowledge.**  
8 Q. And do you know whether the Board in fact  
9 received any further legal advice on this issue?  
10 **A. I believe we did.**  
11 Q. And now I want to restrict my questions now  
12 to the period preceding adoption of the policy, so  
13 we are going to go up to October 19th when you  
14 actually adopted the policy, okay? From whom did  
15 you receive additional legal advice between the  
16 period August 23, 2004 and October 19, 2004?  
17 **A. Mr. Neuberger.**  
18 Q. And when did the Board receive that advice?  
19 **A. I'm not sure of the time frame.**  
20 Q. Was it at a regular Board meeting?  
21 **A. I don't think so.**  
22 Q. Was it at the Board meeting?  
23 **A. Yes.**  
24 Q. So, it was your best recollection is that

1 You will see under the policy committee that there  
2 was a first reading of policy BDA.1 Board Prayer at  
3 Regular Board Meeting for a first reading, do you  
4 see that?  
5 **A. Yes.**  
6 Q. And do you have any reason to doubt from  
7 that if Mr. Walls submitted the policy on September  
8 28?  
9 **A. No.**  
10 Q. Does the Board actually read the policies  
11 when it submits them for a reading?  
12 **A. I do.**  
13 Q. I didn't say that correctly. Does the  
14 Board or some representative of the Board read the  
15 policies out loud so the public understands what's  
16 being considered?  
17 **A. Mr. Walls, when he presents it, usually**  
18 **gives an overview of the existing policy and the**  
19 **recommended changes by highlighting the changes**  
20 **that's coming.**  
21 Q. And it it's a new policy what does he do?  
22 **A. Just describes it as a new policy.**  
23 Q. And to come back to my earlier question,  
24 when the policy is submitted for first reading, that

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1 it was at a special Board meeting?  
2 **A. I think so.**  
3 Q. Am I right that it was sometime between  
4 August 23rd and October 19th?  
5 **A. I think so.**  
6 Q. Am I right that we can refine it further  
7 that it was between August 23rd and the first  
8 reading of the policy?  
9 **A. I think so.**  
10 Q. Before I get to this, pause before you  
11 answer this question please, okay? At the August 23  
12 Board meeting did the Board reject Mr. Griffin's  
13 advice on the issue?  
14 MR. GOSSELIN: Okay, don't answer  
15 that.  
16 MR. ALLINGHAM: based on  
17 attorney/client privilege?  
18 MR. GOSSELIN: Yes.  
19 Q. Let me show you what has previously been  
20 marked as Plaintiff's Exhibit 18 which has been  
21 identified as the minutes of the Board meeting on  
22 September 28, 2004. These are minutes signed by  
23 Mrs. Hobbs as you will see on the last page. If you  
24 will look at page six of these minutes, Mr. Bireley.

1 is a first reading by the Board members, or a first  
2 reading for the push public to comment upon?  
3 **A. It's a first time that it's being mentioned**  
4 **in a public setting.**  
5 Q. And again I am just trying to clarify  
6 because I am not sure what the practice is, is it  
7 typical that the policy that is submitted to first  
8 reading is read out loud during the meeting?  
9 **A. No.**  
10 Q. And am I correct that this School Board  
11 Prayer Policy at Regular Board Meetings was not read  
12 aloud?  
13 **A. I don't recall.**  
14 Q. If it was read aloud that would be a  
15 deviation from your normal practice?  
16 **A. Yes.**  
17 Q. Is it the practice of the Board when a  
18 policy is submitted for first reading to make copies  
19 of it available to the public if they want to review  
20 it?  
21 **A. After the policy comes to the Board?**  
22 Q. At or about the time of the first reading?  
23 **A. I don't believe so.**  
24 Q. Is it the policy of the Board to make

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1 available to the public copies of policies that are  
2 being considered at any time prior to their adoption  
3 by the Board?  
4 **A. I don't believe so.**  
5 Q. Is there any way that the public can take a  
6 look at the policy under consideration and make a  
7 comment to their representative on the Board?  
8 **A. Other than if they had first hand**  
9 **knowledge.**  
10 Q. How would they get first hand knowledge?  
11 **A. If they heard about it or something like**  
12 **that.**  
13 Q. If one of your constituents said I heard  
14 that you are considering a school prayer policy I  
15 would like to see a copy of it, could I have one  
16 would you give it to the person?  
17 **A. Yes.**  
18 Q. Is that as you understand it is that the  
19 practice of all the other Board members?  
20 **A. I hope so. I think so, it's public**  
21 **information.**  
22 Q. Have you ever become aware that a district  
23 resident asked for a copy of the School Board Prayer  
24 Policy after it was adopted and was told that she

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1 couldn't have it and would have to file a FOIA  
2 request?  
3 **A. No, I am not aware.**  
4 Q. Never heard that?  
5 **A. No. No, I am not aware.**  
6 Q. All right. So, looking at Exhibit 18 can  
7 we agree that your consultation with Mr. Neuberger  
8 on the issue of School Board prayer occurred at some  
9 point between August 23rd and September 28th?  
10 **A. I guess so.**  
11 Q. Makes sense, right?  
12 **A. Yes.**  
13 Q. Because by September 28 the Board had  
14 decided that it was going to do what it was -- what  
15 was reflected in the policy?  
16 **A. Yes.**  
17 MS. DUPHILY: Going off the record  
18 at approximately 12:10 p.m..  
19 (WHEREUPON a brief recess was  
20 taken)  
21 MS. DUPHILY: Back on the record  
22 at 12:16 p.m..  
23 Q. Did you as a Board member get a second  
24 opinion from Mr. Neuberger prior to the first

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1 reading of the Board policy on School Board prayer?  
2 **A. As an individual?**  
3 Q. Yes.  
4 **A. No.**  
5 Q. So, you never heard any advice from  
6 Mr. Neuberger on that topic?  
7 **A. Not that I'm aware of.**  
8 Q. You testified earlier that it's your  
9 understanding that Mr. Neuberger did offer a second  
10 opinion on the issue, correct?  
11 **A. To the best of my knowledge.**  
12 Q. How was it delivered to the Board?  
13 **A. It had to be either through the**  
14 **administration like the superintendent or through**  
15 **other Board members.**  
16 Q. Let me see if I can pin that down. You,  
17 Mr. Bireley, received no further legal advice on the  
18 School Board prayer issue after August 23, is that  
19 correct?  
20 **A. From Mr. Neuberger.**  
21 Q. Fair enough. Is that correct?  
22 **A. That's correct.**  
23 Q. Did you receive any advice between August  
24 23 and October 19th on that issue from any other

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1 lawyer?  
2 **A. Not that I'm aware of.**  
3 Q. You told me that Mr. Neuberger offered a  
4 second opinion on the School Board prayer issue, how  
5 do you know that that occurred?  
6 **A. Mr. Helms talked to Mr. Neuberger.**  
7 Q. And Mr. Helms then report the substance of  
8 his conversation with Mr. Neuberger to the Board?  
9 **A. I believe he did.**  
10 Q. And am I correct that that report from Mr.  
11 Helms came at some point between August 23 and  
12 September 28th?  
13 **A. Again I'm not sure of the time frame, but I**  
14 **would think so.**  
15 Q. And did that report from Mr. Helms come at  
16 a regular Board meeting? Sorry, I misspoke. Did  
17 that report from Mr. Helms come at a meeting of the  
18 full Board?  
19 **A. I believe so.**  
20 Q. I'm going to show you, I'm leaving aside  
21 the big meeting because I assume that report from  
22 Mr. Helms did not come at the big meeting, correct?  
23 **A. I think so, yes.**  
24 Q. I'm leaving aside the big meeting, we have

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1 no minutes of any full Board meeting between August  
2 24th and the first reading at September 28th.  
3 However, in the, it is the practice of the Board to  
4 approve at regular meeting to approve the minutes of  
5 any meeting that has taken place since at the  
6 preceding Board meetings, correct?  
7 **A. Yes.**  
8 Q. I'm going to show you PX19 which has been  
9 identified as the minutes of the October 19, 2004  
10 regular meeting of the Board. You are reflected on  
11 the first page as having been in attendance?  
12 **A. Yes.**  
13 Q. And if you look at page two at the top you  
14 will see that there is an approval of Board minutes  
15 from a regular meeting on September 28th and a  
16 special meeting on September 15th, do you see that?  
17 **A. Yes.**  
18 Q. Is it your belief based on this document  
19 that the report from Mr. Helms came at the September  
20 15th special meeting of the Board?  
21 **A. It's possible, but I have no first hand**  
22 **knowledge. I mean I can't remember exactly when it**  
23 **was.**  
24 Q. Based on the Board's practice of approving

1 Q. And do you know whether the September 15th  
2 meeting was audiotaped?  
3 **A. I don't have first hand knowledge of it but**  
4 **I assume that it was.**  
5 Q. Tell me everything that you can recall  
6 about what Mr. Helms reported to the Board?  
7 MR. GOSSELIN: Object, don't  
8 answer that.  
9 Q. Did Mr. Helms' report to the Board  
10 concerning Mr. Neuberger's second opinion enter into  
11 your consideration of whether to approve the School  
12 Board Prayer Policy? Was it a factor that you  
13 considered in determining whether to vote to adopt  
14 the School Board Prayer Policy?  
15 **A. Yes.**  
16 Q. Do you have any understanding as to whether  
17 that second opinion was a factor in your colleagues'  
18 consideration of whether to adopt the School Board  
19 Prayer Policy?  
20 MR. GOSSELIN: Objection.  
21 **A. I can't speak to what they thought.**  
22 Q. You'll recall that at the August 23 meeting  
23 the Board concluded it couldn't make a decision at  
24 that time and you told me that what it needed to

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1 meeting minutes for the meetings in the intervening  
2 period between the last meeting and this meeting,  
3 and the fact that the only meeting referenced here,  
4 between the period that we are focusing on, that is  
5 a August 23 to September 28th, is September 15th,  
6 would you agree with me that it's a fair inference  
7 that Mr. Helms' report came at the September 15th  
8 special meeting?  
9 **A. Yes.**  
10 Q. Is it the Board's practice to keep minutes  
11 of every meeting that it holds whether regular or  
12 special?  
13 **A. Yes.**  
14 Q. Do you know whether the September 15th  
15 meeting was in executive session?  
16 **A. I can't remember.**  
17 Q. Do you know whether Mr. Helms' report,  
18 whenever it occurred took place during a public  
19 session or an executive session?  
20 **A. I would say that it took place in executive**  
21 **session.**  
22 Q. And the Board's practice is to tape its  
23 meetings, is that correct, audiotape?  
24 **A. Yes.**

1 make a decision was a second opinion on the issue, a  
2 second legal opinion on the issue, do you recall  
3 that?  
4 **A. Yes.**  
5 Q. Apart from the second legal opinion on the  
6 issue that you received indirectly from Mr. Helms,  
7 did the Board get any further information about the  
8 School Board Prayer Policy between August 23 and the  
9 first reading on September 28th?  
10 **A. Not that I'm aware of.**  
11 Q. Mr. Bireley, you've been individual as the  
12 district's 30(b)(6) witness on the topic of how the  
13 Board would determine whether a prayer offered by a  
14 Board member would violate paragraph three of the  
15 policy. So, I'd like you to put the policy in front  
16 of you again. It has PX9 written on it somewhere.  
17 **A. Okay.**  
18 Q. And I'm going give you a couple of examples  
19 and ask you to tell me how would you analyze these  
20 prayers, as to whether they are proselytizing,  
21 whether they would violate paragraph three, okay?  
22 **A. Okay.**  
23 Q. The first once is this prayer, Allah, we  
24 offer you our school bus drivers, we offer you our

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1 superintendent, our administrators, and our  
2 secretaries, we offer you our teachers and our  
3 parents. Finally we offer you our students. Peace  
4 be unto your prophet Muhammad.  
5 MR. GOSSELIN: Objection. Go  
6 ahead.  
7 Q. Describe for me how you would analyze  
8 whether that prayer would violate paragraph three of  
9 the policy?  
10 **A. I don't know whether that it would violate**  
11 **that paragraph.**  
12 Q. Okay, that's a good maybe way to get into  
13 this. Do you believe that that prayer would violate  
14 the policy?  
15 **A. No.**  
16 Q. And would you explain to me how you would  
17 reach that conclusion?  
18 **A. I don't see where that someone reciting**  
19 **that prayer is trying to push their beliefs off**  
20 **towards anyone else that's in attendance.**  
21 Q. And is that the basic way you would look at  
22 that problem, that issue of whether it violates  
23 paragraph three?  
24 **A. I think so.**

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1 Q. Now, I'm going to read another prayer for  
2 you which may be familiar to you. If it's not  
3 familiar to you or if you can't hold it in your head  
4 I can give it to you on a piece of paper, but let me  
5 read it first, all right? Do not put your trust in  
6 princes, in mortal men who cannot even save  
7 themselves. When their spirit departs, they return  
8 to the ground. On that very day their plans come to  
9 nothing. Blessed is he whose help is the God of  
10 Jacob, whose hope is in the Lord his God, the Maker  
11 of heaven and earth, the sea, and everything in  
12 them. The Lord, who remains faithful forever. He  
13 upholds the cause of the oppressed and gives food to  
14 the hungry. The Lord sets prisoners free, the Lord  
15 gives sight to the blind, the Lord lifts up those  
16 who are bowed down, the Lord loves the righteous.  
17 The Lord watches over the alien and sustains the  
18 fatherless and the widow, but he frustrates the ways  
19 of the wicked. For the wages of sin is death; but  
20 the gift of God is eternal life through Jesus Christ  
21 our Lord.  
22 MR. GOSSELIN: Objection.  
23 Q. Does --  
24 MR. GOSSELIN: Is that something

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1 that can be marked cause I may want to ask  
2 some questions at the end of this based on  
3 not rather than making our court reporter  
4 go all the way back.  
5 MS. DUPHILY: We are going off the  
6 record at approximately 12:27 p.m..  
7 (WHEREUPON a brief recess was  
8 taken)  
9 MS. DUPHILY: Back on the record  
10 12:29 p.m..  
11 Q. Mr. Gosselin has suggested and I'm amenable  
12 to marking what I just read as an exhibit. So, I'm  
13 going to mark as PX35 the text that I just read to  
14 you. Would that prayer violate paragraph three of  
15 the Board Prayer Policy?  
16 **A. In my opinion?**  
17 Q. Yes.  
18 **A. No.**  
19 Q. Would you tell me how you would analyze  
20 that question as a Board member?  
21 **A. Analyze this one?**  
22 Q. Yes.  
23 **A. If someone used that as an opportunity to**  
24 **basically preach a sermon, or try to convert, saying**

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1 **something that Christianity is the only religion,**  
2 **you know or that's what I would consider to be a**  
3 **violation of paragraph three.**  
4 Q. And you would not view the prayer that I  
5 just had marked as PX35 as an example of what you  
6 just described?  
7 **A. No.**  
8 Q. I'm correct am I not that it was your  
9 intent as a Board member to adopt School Board  
10 Prayer Policy that complied with existing applicable  
11 law?  
12 **A. Yes.**  
13 Q. And in your, in casting your vote to adopt  
14 that policy your belief that the policy that you  
15 approved complied with applicable law was based in  
16 part on Mr. Helms' report to you about  
17 Mr. Neuberger's second opinion. I don't want to  
18 know the substance of the opinion, I just want to  
19 know if that was part of your consideration in  
20 reaching a conclusion on that issue?  
21 **A. Probably so.**  
22 Q. All right, I have a third prayer for you to  
23 consider. Heavenly Father, thank you for this great  
24 occasion, for the work, the effort, the joys and

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1 everything that led up to this point in time. Thank  
2 you for your guidance in this event. We pray for  
3 your direction in the lives of each of those in  
4 attendance. We pray that you direct them into the  
5 truth, and eventually the truth that comes by  
6 knowing Jesus. We pray that you would be with them  
7 now. We ask these things in Jesus's name. Amen.

8 MR. GOSSELIN: Objection.

9 Q. As a Board member would view that prayer as  
10 a proselytizing prayer?

11 A. Yes.

12 Q. And describe for me as well as you can the  
13 difference between this third prayer that I read and  
14 the first two that you as a Board member would  
15 consider nonproselytizing?

16 A. My personal opinion what you just read,  
17 they are basically saying that the only way through  
18 to heaven or to God is through Jesus Christ. I  
19 think that's the difference.

20 In other words, in that prayer you are  
21 saying, they are saying that that's the only way, if  
22 I am hearing it correctly. And I didn't think that  
23 I interpreted that from the first two that that's  
24 what it said.

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1 Q. So, the critical distinction, Mr. Bireley  
2 is whether the content of the prayer suggest that  
3 the only true religion or the only way to heaven or  
4 only way to truth is through a particular faith, or  
5 a particular Deity or representation of an Deity, is  
6 that correct?

7 MR. GOSSELIN: Objection.

8 Q. Is that the distinction that you are trying  
9 to draw?

10 A. That the only way is through Jesus Christ.

11 Q. Or presumably the way through Muhammad  
12 or —

13 A. Okay, I'm sorry, yes, some other.

14 Q. And so long as a prayer doesn't say that  
15 the only true way is through a particular Deity or a  
16 particular faith you would find the prayer  
17 nonproselytizing and not violative of paragraph  
18 three?

19 MR. GOSSELIN: Objection.

20 A. Yes, in my opinion.

21 Q. We were informed in an interrogatory answer  
22 that you a Methodist, is that correct?

23 A. Yes.

24 Q. And do you attend church?

1 A. Once in a while.

2 Q. What church do you attend?

3 A. My wife's church if I go.

4 Q. Which church is that?

5 A. Bethel Methodist in Dagsboro.

6 Q. Would you characterize yourself as a person  
7 who attends on big religious holidays, but not every  
8 Sunday?

9 A. I'm not sure that the big religious  
10 holidays. Once in a while, I would say once in a  
11 while I do. Not just that church but I go to, I  
12 have had occasions to go to other churches, too.  
13 But I'm not a every Sunday attendee, if that's what  
14 you are asking me, I'm not.

15 Q. On the other hand you would consider  
16 yourself a practicing Christian?

17 A. I try to. I try to do what's right and I  
18 mean I am aware of what the teachings say is right  
19 and I try to do that.

20 Q. In order to be a practicing Christian do  
21 you consider it necessary to attend church on  
22 Easter, for example?

23 A. No.

24 Q. Or to attend church on Christmas?

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1 A. No.

2 Q. In order to be a practicing Christian do  
3 you consider it necessary to attend church at all?

4 A. No.

5 Q. Again on the issue of practice paragraph  
6 three of Board prayer, would you consider that a  
7 student who attends every regular Board meeting and  
8 who hears prayers that regularly mention Jesus  
9 Christ could conclude over time that it is the  
10 Board's view that Christianity is the appropriate  
11 religion?

12 MR. GOSSELIN: Objection.

13 A. I guess that's possible.

14 Q. What I'm trying to get at, Mr. Bireley, is  
15 whether you would consider the cumulative affect of  
16 repeated mention of only one faith or only one  
17 representation of the Deity to have some impact,  
18 cumulative impact over and above the text of a  
19 prayer that's offered?

20 MR. GOSSELIN: Objection.

21 Q. Would you agree with that?

22 A. It's possible.

23 Q. From your perspective as a Board member do  
24 you think it would be preferable to avoid that kind

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1 of cumulative impact, that is to say to offer a  
2 variety of kinds of prayers or moments of silence to  
3 solemnize the occasion?  
4 MR. GOSSELIN: Objection.  
5 **A. I think the policy, or the practice that we**  
6 **have right now, where the individual person who is**  
7 **saying the prayer has the right to say, you know,**  
8 **whatever they want.**  
9 Q. I'm not asking about individual person's  
10 rights, I'm asking about what as a Board member  
11 would consider preferable? Would you consider it  
12 preferable to in order to solemnize the proceedings  
13 for a variety of kinds of prayers, moments of  
14 silence to be offered?  
15 **A. I believe in the person's individual right**  
16 **to say what they want to say when they're in prayer.**  
17 **I think that's the way it should be.**  
18 Q. Was the purpose of the adoption of the  
19 School Board Prayer Policy to solemnify the  
20 proceedings of the Board meetings?  
21 **A. By that you mean to ask for like divine**  
22 **guidance or help us get through the meeting, to make**  
23 **the right decisions.**  
24 Q. I'm really trying to ask a very specific

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1 question. I'll be a little more general about it.  
2 I won't sort of put the answer in the question.  
3 What was the purpose of the adoption of the Board  
4 Prayer at Regular Board Meetings Policy?  
5 **A. What was the purpose?**  
6 Q. Yes.  
7 **A. To ask for divine guidance for the Board to**  
8 **help us make correct decisions and get us through**  
9 **the meeting in the proper way.**  
10 Q. What does the proper way mean?  
11 **A. To do, to make the best decisions for**  
12 **what's best for our students.**  
13 Q. And is the proper way the way that God  
14 would prefer?  
15 **A. In my opinion, yes.**  
16 Q. And is the proper way the way that God  
17 personified by Jesus Christ would prefer?  
18 **A. In my personal opinion, yes.**  
19 Q. And that was the purpose of the adoption of  
20 the School Board Prayer Policy?  
21 **A. The purpose of adopting the School Board**  
22 **policy is to grant us the opportunity to pray for**  
23 **divine guidance, you know and help us make the right**  
24 **decisions.**

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1 Q. As a Board member when you cast your vote  
2 in favor of Board Policy BDA.1, you cast that vote  
3 in public, correct?  
4 **A. Yes.**  
5 Q. And did you expect that members of the  
6 public in attendance would understand that that was  
7 your purpose in adopting the School Board Prayer  
8 Policy?  
9 **A. I really had no way of knowing what they**  
10 **thought.**  
11 Q. If a member of the public had raised their  
12 hand, that's not the right way to say it. If they  
13 signed up to ask a question of the Board during the  
14 public comment session at the October 19th meeting,  
15 and had asked the question what was your purpose in  
16 casting your vote for Board Policy BDA.1, is that s  
17 what you would have responded?  
18 **A. Not at that time.**  
19 Q. What would you have responded at that time?  
20 **A. I wouldn't have responded anything.**  
21 Q. You would have declined to answer a  
22 question what is your purpose in adopting this  
23 policy?  
24 **A. Yes.**

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1 Q. What would be the reason for declining to  
2 answer?  
3 **A. That's the way we do it. We have been**  
4 **given advice from attorneys for years and years and**  
5 **years not to respond. You write the question down**  
6 **and then you seek that person after the meeting's**  
7 **over and then you have a discussion with them and**  
8 **tell them why that you voted the way that you did or**  
9 **ask them if there is anything else that they want to**  
10 **know.**  
11 Q. So, the Board has a policy based on legal  
12 advice not to respond to questions about why the  
13 Board members cast votes to adopt a particular  
14 policy?  
15 **A. Let's say that it's a practice, it's not a**  
16 **policy.**  
17 Q. Yes, I didn't mean it was written down, I  
18 apologize?  
19 **A. Okay.**  
20 Q. So, I will use your word, so the Board has  
21 a practice based on legal advice not to respond to  
22 questions from the public about the Board's purpose  
23 in adopting a particular policy?  
24 **A. During the time of the Board meeting.**

39 (Pages 150 to 153)

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1 Q. Yes. But the Board also had a practice  
2 understood by board members that those questions can  
3 and should be responded to after the Board meeting?  
4 **A. Yes.**  
5 Q. All right, so let me just amend my  
6 question, suppose that a member of the public had  
7 come up to you after the October 19th Board meeting  
8 and said Mr. Bireley what was your purpose in  
9 casting your vote to adopt Board Policy BDA.1, your  
10 response would have been in words or substance the  
11 same answer you gave me?  
12 **A. Yeah.**  
13 Q. Why is it that in the 30 years that you  
14 have served as a Board member you have never taken  
15 up the invitation or volunteered to offer a prayer  
16 or moment of silence to open the Board meeting?  
17 **A. For personal preference, my choice.**  
18 Q. Based on what?  
19 **A. Base on the fact that that's not the way**  
20 **that I, you know, proclaim my way to God.**  
21 Q. That being offering public prayer?  
22 **A. In a public, you know, what I do is in**  
23 **private.**  
24 Q. Can you see any reason why the Board could

1 **A. At that particular instance.**  
2 Q. At every Board meeting?  
3 **A. Not at the Board meeting, no.**  
4 Q. Do you seek divine guidance generally with  
5 the hope that it would extend to your decisions at  
6 Board meetings?  
7 **A. Yes.**  
8 Q. So, that your practice in terms of your  
9 relationship with God and the request for divine  
10 guidance is to do it privately?  
11 **A. Yes.**  
12 Q. And for you it is equally effective whether  
13 you do it privately for publicly?  
14 **A. As a personal thing, yes.**  
15 Q. Yes, sir. In fact from your personal  
16 preference you prefer to do it privately rather than  
17 publicly?  
18 **A. Yes, I do.**  
19 MR. GOSSELIN: It's ten of  
20 1 --  
21 MR. ALLINGHAM: I'm happy to  
22 break whenever you want.  
23 MR. GOSSELIN: Why don't we break  
24 now.

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1 not ask for divine guidance in private rather than  
2 on the stage in front of the public meeting?  
3 **A. That they -- please you ask it again?**  
4 Q. Yes. Do you see any reason why the Board  
5 could not effectively ask for divine guidance for  
6 its decisions at Board meetings off stage rather  
7 than on stage in front of the public meeting?  
8 **A. That's possible, yes.**  
9 Q. And can you think of any reason why the  
10 Board's private request for divine guidance for its  
11 members would not be equally effective as a public  
12 request for divine guidance?  
13 **A. In the eyes of the Almighty?**  
14 Q. Yes.  
15 **A. No.**  
16 Q. In the eyes of the individual Board  
17 members?  
18 **A. Yes.**  
19 Q. And what is that reason?  
20 **A. I don't know, personal preferences. That's**  
21 **the way they choose to do it.**  
22 Q. Let me now ask that question of you.  
23 Do you seek divine guidance before you embark on the  
24 process of making decisions at Board meetings?

1 MS. DUPHILY: We are going off the  
2 record at approximately 12:50 p.m..  
3 (WHEREUPON a lunch recess was  
4 taken)  
5 MS. DUPHILY: We are back on the  
6 record at 1:48 p.m.  
7 Q. Mr. Bireley, I ask you to take up PX34  
8 which is the attachment that was provided by  
9 Mr. Helms to individual members the Board at a  
10 meeting which we've identified tentatively as  
11 September 15, 2004, do you recall that?  
12 **A. Yes.**  
13 Q. And is this a handout that Mr. Helms  
14 provided to the Board in connection with his report  
15 on Mr. Neuberger's advice?  
16 **A. I believe so.**  
17 Q. So, I'm correct, am I not, that this  
18 document PX34 was not the entirety of Mr. Helms'  
19 report on Mr. Neuberger's second opinion but it was  
20 a part of it?  
21 **A. Part of it, yes.**  
22 Q. And did you as a Board member read this  
23 document at the September 15th Board meeting when  
24 Mr. Helms passed it out?

40 (Pages 154 to 157)

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1 **A. I read it whenever I received it, and I'm**  
2 **not sure, you know.**  
3 Q. Right, it might have come as part of the  
4 Board package?  
5 **A. Right, but I did read it, yes I did.**  
6 Q. Now, you testified earlier that you didn't  
7 know where Mr. Walls got the text of the Board  
8 policy BDA.1, the School Board Prayer Policy, do you  
9 recall that?  
10 **A. Yes.**  
11 Q. I'd like you to look at the second to last  
12 and last pages of this handout, and read the  
13 paragraphs numbered one through five on those pages?  
14 **A. Okay.**  
15 Q. You can compare it to the Board policy if  
16 you like, but can we agree that the text of the  
17 paragraphs one through five in the Helms Neuberger  
18 handout are substantively identical to the Board  
19 policy as ultimately adopted?  
20 **A. Yes.**  
21 Q. And can we conclude, therefore, that the  
22 text of the Board policy was prepared by the  
23 Rutherford Institute as reflected at the top of the  
24 second page of PX34?

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1 MR. GOSSELIN: Objection. You can  
2 answer.  
3 **A. I can answer it?**  
4 MR. GOSSELIN: Yes.  
5 **A. It appears so, yes.**  
6 Q. okay. On the next to last page sorry, the  
7 beginning one, two, three, first three and a half  
8 pages of the Rutherford Institute Neuberger  
9 presentation is in the form of somewhere whereas  
10 clauses, do you see that?  
11 **A. I'm not sure. Are you talking about these**  
12 **right here? Are you talking about on page five?**  
13 Q. No, I'm looking at the, just start at the  
14 second page, the first page of the actual handout?  
15 **A. Oh, okay I'm sorry.**  
16 Q. You see these paragraphs start with  
17 whereas, whereas, whereas?  
18 **A. Yes.**  
19 Q. And they continue on periodically with some  
20 other whereases, and on the middle of the second  
21 page of the handout you'll see the second whereas  
22 clause says, "whereas the School Board has obtained  
23 the legal vice of two competent and experienced  
24 constitutional attorneys, John Whitehead and Thomas

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1 Neuberger, that prayer to open Board meetings is  
2 constitutional in the United States Court of Appeals  
3 for the Third Circuit which includes Delaware, and  
4 legal counsel have identified the following legal  
5 authority in support of their legal opinion," do you  
6 see that?  
7 **A. Yes.**  
8 Q. And did you obtain the legal advice of two  
9 competent and experienced constitutional attorneys  
10 Messers whitehead and Neuberger?  
11 **A. As that again, please.**  
12 Q. In fact, did you obtain the legal advice of  
13 two competent and experienced constitutional  
14 attorneys John Whitehead and Tom Neuberger?  
15 **A. We did, Mr. Neuberger through Mr. Helms.**  
16 Q. Okay, but you are not aware that he got the  
17 advice of John Whitehead?  
18 **A. No.**  
19 Q. And in fact does the introductory section  
20 before those numbered paragraphs I had you look at,  
21 just a few questions earlier does that constitute  
22 the legal advice that you got from Mr. Neuberger?  
23 **A. I believe so.**  
24 Q. Yes, and that was the legal advice that you

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1 reviewed?  
2 **A. Yes.**  
3 Q. Passed through to you by Mr. Helms?  
4 **A. Yes.**  
5 Q. Okay, now did Mr. Neuberger at any time up  
6 to October 19, 2004 when you adopted School Board  
7 Prayer Policy appear personally before the Board?  
8 **A. To the best of my knowledge we talked to**  
9 **Mr. Neuberger one time face to face as to**  
10 **consideration whether or not he was going to**  
11 **represent us or something.**  
12 Q. When was that?  
13 **A. I don't know exactly, but it was somewhere**  
14 **in this frame, time frame.**  
15 Q. Do you recall that Mr. Neuberger said to  
16 the members of the Board look you got to decide  
17 today whether you are going to retain me?  
18 **A. Yes, I do.**  
19 Q. And he did say that and the Board concluded  
20 that it would not make that decision that day and  
21 therefore decided not to retain him?  
22 **A. That's a fair statement, yes.**  
23 Q. And did that decision not to retain him on  
24 Mr. Neuberger's terms occur before the September

41 (Pages 158 to 161)

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1 15th meeting at which Mr. Helms relayed  
2 Mr. Neuberger's advice?  
3 **A. I'm not positive, but I believe that it**  
4 **did.**  
5 Q. Okay. I'm going to ask you to assume for  
6 purposes of the next couple of questions that that  
7 decision not to retain Mr. Neuberger occurred before  
8 -- excuse me, I'll just withdraw the question.  
9 We talked before lunch about the decision  
10 on August 23rd at that long executive session  
11 meeting to get a second legal opinion. How did you  
12 decide or how was it decided whom to go to to seek  
13 that second legal opinion?  
14 **A. I believe again, if I recall this**  
15 **correctly, the administration, the superintendent's**  
16 **or her designee was suppose to talk to some people.**  
17 Q. Did the Board itself say here is who you  
18 should talk to?  
19 **A. Not to my knowledge.**  
20 Q. Did you think Mr. Hobbs knew where to go to  
21 get First Amendment advice?  
22 **A. I'm not sure about the First Amendment**  
23 **advice, but that's the way that we do things.**  
24 Q. I didn't mean to be so technical. Did you

1 Q. Okay. Did anybody on the Board question  
2 why you were relying on a second legal opinion from  
3 an attorney whom the Board had already decided not  
4 to retain?  
5 **A. I guess not.**  
6 Q. In retrospect does that seem like a good  
7 question for somebody to have asked?  
8 **A. The thing with Mr. Neuberger was a**  
9 **complicated issue.**  
10 Q. Explain why?  
11 **A. It's not a black and white issue.**  
12 Q. Explain why?  
13 **A. When Mr. Neuberger came in and I'm not sure**  
14 **but I think there was either nine or ten Board**  
15 **members there, and he had said his statement that**  
16 **you previously said, you know keep us there all**  
17 **night long, whatever, and he wanted to know, we**  
18 **needed to make a decision. And there was some Board**  
19 **members at the time who wanted to basically get,**  
20 **they wanted to ask some questions from another**  
21 **source, maybe their own personal sources or**  
22 **something like that, therefore that's the reason we**  
23 **ended up not having Mr. Neuberger to represent the**  
24 **entire Board.**

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1 think that Mrs. Hobbs knew where to go to get a  
2 second opinion on School Board prayer issues?  
3 **A. Yes.**  
4 Q. How would she have known that?  
5 **A. She could call any attorney and ask them**  
6 **their opinion of where we should go.**  
7 Q. And is it your understanding that Mrs.  
8 Hobbs called Tom Neuberger?  
9 **A. No.**  
10 Q. How was the connection made between Mrs.  
11 Hobbs and Mr. Neuberger?  
12 **A. I don't think that it was.**  
13 Q. How did the Board come to seek a second  
14 legal opinion from Mr. Neuberger, who made that  
15 decision?  
16 **A. It was through Mr. Helms, he suggested**  
17 **that.**  
18 Q. At the August 23rd meeting?  
19 **A. I'm not sure about the time frame, you**  
20 **know, but it was Mr. Helms who originally called**  
21 **him.**  
22 Q. And it was Mr. Helms who followed-up and  
23 asked for the opinion?  
24 **A. Yes.**

1 Q. Because Mr. Neuberger delivered this  
2 scheduling ultimatum and the Board was not willing  
3 to accept it?  
4 **A. Pretty much so, yes.**  
5 Q. All right. Who were the members of the  
6 Board who wanted to ask questions of other sources  
7 on the issue?  
8 **A. I would say pretty much everyone except**  
9 **maybe Mr. Helms.**  
10 Q. Okay on PX34 look at page, it's the one  
11 that has 717 down at the bottom, it's the next to  
12 last page. And I'm looking at the paragraph right  
13 above the numbered paragraphs, the one that starts  
14 thus it is the opinion, do you say where I am?  
15 **A. Yes.**  
16 Q. And it says, thus "It is the opinion of  
17 legal counsel that the Supreme Court's decision in  
18 Marsh v. Chambers, which unlike the Coles decision  
19 is binding precedent in Delaware, compels the  
20 conclusion that the Indian River School District's  
21 tradition of opening its meetings with a brief  
22 invocation is constitutionally permissible."  
23 In summary, is that the opinion on which  
24 you relied in adopting Board policy BDA.1?

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1 **A. I would say it had a great impact on it,**  
2 **yes.**  
3 Q. Now, apart from this document what else did  
4 Mr. Helms tell you about Mr. Neuberger's second  
5 legal opinion?  
6 **A. I really don't know that I can recall**  
7 **anything other than just chitchat that he had talked**  
8 **to him and that he was --**  
9 MR. GOSSELIN: Objection, I  
10 apologize for interrupting you in the  
11 middle of your answer, but I object and I'm  
12 instructing you not to complete your  
13 answer, because I think it runs afoul of  
14 what we talked about before.  
15 MR. ALLINGHAM: Well, I know that  
16 I'm not going to convince you but let put  
17 my position on the record. I agree that it  
18 runs afoul of a proposed guideline that you  
19 suggested should apply, but we have here  
20 testimony that this document is the legal  
21 opinion on which Board members relied in  
22 adopting the policy. You produced it. You  
23 can't tell me now that I can read something  
24 that the Rutherford Institute prepared, but

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1 I can't hear what one of the Board members  
2 reported the Rutherford Institute or  
3 Mr. Neuberger said on the same topic. That  
4 is, you can't selectively waive a  
5 privilege.  
6 MR. GOSSELIN: This obviously this  
7 was intended to be, and actually I'd rather  
8 than clutter up the record, I'm not trying  
9 to be --  
10 MR. ALLINGHAM: You are not going  
11 to change your mind?  
12 MR. GOSSELIN: No, I'm not but I  
13 would be happy to tell you why, because I'm  
14 really not trying to be extreporous here,  
15 this document evidently was prepared with  
16 the intention that it would be adopted as a  
17 policy.  
18 MR. ALLINGHAM: You are  
19 testifying. I'm done, if you won't change  
20 your mind that's fine.  
21 MR. GOSSELIN: All right.  
22 Q. Other than this document PX34 did Mr. Helms  
23 pass out any or was there included in the Board  
24 package any other documents reflecting referring or

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1 relating to Mr. Neuberger's second legal opinion?  
2 **A. Not that I'm aware of.**  
3 Q. Would you pick up PX9 the actual Board  
4 policy again. Paragraph one is reads, "In order to  
5 solemnify its proceedings, the Board of Education  
6 may choose to open its meetings with a prayer or  
7 moment of silence, all in accord with the freedom of  
8 conscience of the individual adult Board member."  
9 Your understanding of, "In order to  
10 solemnify its proceedings," is in words or substance  
11 as I understand your testimony from before lunch in  
12 order to permit Board members publicly to seek  
13 divine guidance for their decisions at that Board  
14 meeting, is that a fair summary?  
15 **A. I would say so.**  
16 Q. Okay, so from your perspective as a Board  
17 member it would not change the meaning of this  
18 policy if I simply substituted the words in order to  
19 permit Board members publicly to seek divine  
20 guidance for their decisions at that the Board  
21 meeting, in exchange for the words, "In order to  
22 solemnify its proceedings?"  
23 MR. GOSSELIN: Objection.  
24 Q. The meaning would remain unchanged?

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1 **A. Would you mind reading that, the second one**  
2 **again?**  
3 Q. Yeah slower, I'm sorry. If I were to  
4 delete the words, "In order to solemnify its  
5 proceedings," and substitute for them the following  
6 words, which I'll try to read a little more  
7 carefully, in order to permit Board members publicly  
8 to seek divine guidance for their decisions at that  
9 Board meeting, okay, that substitution would not  
10 change the meaning of this policy in any way?  
11 MR. GOSSELIN: Objection.  
12 Q. In your opinion as a Board member?  
13 **A. In my opinion it wouldn't.**  
14 MR. ALLINGHAM: Okay. Could you  
15 mark please as PX36 a document bearing  
16 Bates number BPD503.  
17 (WHEREUPON Plaintiff's Exhibit 36  
18 was marked for identification.)  
19 Q. Have you ever seen PX36 before?  
20 **A. Yes.**  
21 Q. When did you see it?  
22 **A. I'm not sure of the date, but I know that**  
23 **I've seen it.**  
24 Q. It's dated August 19th, was it on or about

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1 that date that you saw it?  
2 **A. Yes.**  
3 Q. Who provided it to you?  
4 **A. I'm not sure whether it came from Mr. Helms**  
5 **or whether it came from the district office. I**  
6 **would say one of the two.**  
7 Q. And did you read it when you were provided  
8 a copy of the?  
9 **A. Yes.**  
10 Q. Did you see anything in it that was  
11 inaccurate?  
12 **A. It's been some time.**  
13 Q. Read it again if you like, see if you can  
14 refresh your recollection?  
15 **A. Okay.**  
16 Q. Have you now read PX36?  
17 **A. Yes.**  
18 Q. Do you recall when you first read it noting  
19 anything in it that was inaccurate in your view?  
20 MR. GOSSELIN: Objection.  
21 **A. Not at the time.**  
22 Q. Now that you have read it, now you see it's  
23 inaccurate?  
24 MR. GOSSELIN: Objection.

1 **A. It's a possibility.**  
2 MR. GOSSELIN: Objection, don't  
3 answer that.  
4 Q. Did the School Board ever consider a policy  
5 that would simply have provided for opening its  
6 meetings with a moment of silence?  
7 **A. Consider a policy stating that?**  
8 Q. Yes.  
9 **A. Not that I remember.**  
10 Q. When the policy was being discussed, did  
11 the School Board ever consider the possibility of  
12 opening its meetings with a moment of silence?  
13 **A. It was certainly discussed.**  
14 Q. Do you remember who raised that issue?  
15 **A. No, I don't.**  
16 Q. Do you remember at what time that issue was  
17 raised?  
18 **A. During the same time frame that we were**  
19 **considering this.**  
20 Q. So, that period of time up to September  
21 28th first reading?  
22 **A. I guess so, yeah.**  
23 Q. And tell me what the discussion was of the  
24 possibility that the Board should open its meetings

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1 **A. No.**  
2 Q. At any time in your dealings with  
3 Mr. Neuberger did it occur to you Mr. Bireley that  
4 Mr. Neuberger seemed to have a strong interest in  
5 publicizing Mr. Neuberger?  
6 **A. You mean like blowing his own horn**  
7 **something like that?**  
8 Q. Yeah.  
9 **A. Okay.**  
10 Q. The answer is yes?  
11 MR. GOSSELIN: Do you agree with  
12 that?  
13 **A. Yes, I do, I agree.**  
14 Q. And did that form any part of your  
15 consideration in choosing not to retain  
16 Mr. Neuberger on behalf of the Board?  
17 **A. Me personally?**  
18 Q. Yes.  
19 **A. No.**  
20 Q. Do you know where Mr. Neuberger -- did you  
21 ever speak to Mr. Neuberger? Did you ever provide  
22 Mr. Neuberger with any information about the Indian  
23 River School Board's historical practices regarding  
24 opening its meetings with a prayer?

1 with a moment of silence?  
2 **A. Well --**  
3 MR. GOSSELIN: To the extent that  
4 this is not based on information obtained  
5 from counsel.  
6 **A. Okay, this would be from individual Board**  
7 **members?**  
8 Q. Yes, sir?  
9 **A. It was suggested and was discussed and they**  
10 **decided not to do it because they still thought that**  
11 **each individual Board member had the right to say**  
12 **whatever they wanted to say in their moment of the**  
13 **time that they give a prayer.**  
14 Q. Did somebody say look if we just open the  
15 meeting with a moment of silence it is not going to  
16 be seeking divine guidance for our decisions at the  
17 Board meeting?  
18 **A. I don't recall that being said. I don't**  
19 **recall anybody saying that.**  
20 Q. The policy itself contemplates, if you look  
21 at PX9, sir that the Board of Education may choose  
22 to open its meeting with a moment of silence, right?  
23 **A. Yes.**  
24 Q. And so am I correct that the policy itself

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1 contemplates that moment of silence would be  
2 effective to solemnify the proceedings?  
3 **A. In some people's mind, yes.**  
4 Q. And the policy itself contemplate that it  
5 would be effective to solemnify the proceedings by  
6 opening with a moment of silence, is that correct?  
7 **A. What the policy says?**  
8 Q. Yes, sir. Did anyone raise the question if  
9 as the policy reflects being a moment of silence  
10 would be effective to solemnify the proceedings why  
11 it was necessary also to offer the option to  
12 individual Board members to open the meetings with a  
13 prayer?  
14 **A. The discussion that I remember what that**  
15 **it's an individual's choice.**  
16 Q. Was the inclusion in the Board Prayer  
17 Policy of the option to open its meeting with a  
18 prayer intended to protect individual Board members'  
19 rights to express their religion as they saw fit?  
20 MR. GOSSELIN: Objection to the  
21 form.  
22 **A. To prevent them from doing it?**  
23 Q. To protect their rights to express their  
24 religion as they saw fit?

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1 **A. I guess that's a fair statement.**  
2 Q. Was a reason for the adoption of this  
3 policy to protect individual Board members' First  
4 Amendment rights to express their religion as they  
5 see fit?  
6 MR. GOSSELIN: Objection.  
7 **A. I will agree.**  
8 Q. Did anybody give any consideration to  
9 calling this policy the policy to protect individual  
10 Board members First Amendment rights?  
11 **A. No, not that I recall.**  
12 Q. Do you know why the title of the policy was  
13 changed from Policy on Prayer at Board Meetings,  
14 which is what the first Rutherford Institute  
15 document that Mr. Helms passed to you to Board  
16 Prayer at Regular Board Meetings?  
17 **A. The only thing I can recall in particular I**  
18 **remember someone asking the question that was the**  
19 **only time that we did it, and it was stated at**  
20 **regular Board meetings because we didn't do it at**  
21 **any other type of meetings.**  
22 Q. Got you. That's not because Board members  
23 didn't think they could equally use divine guidance  
24 at special Board meetings that you never had done

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1 it?  
2 **A. I guess that's true.**  
3 Q. So, as far as you were able to tell Board  
4 members did think they needed divine guidance for  
5 special Board and regular Board meetings?  
6 **A. Yes.**  
7 MR. GOSSELIN: And everywhere  
8 else.  
9 Q. In the Board School Board Prayer Policy we  
10 talked a little bit about how you as the president  
11 set up the rotating basis, I have a few more  
12 questions on that.  
13 As things stand now in your service as the  
14 Board president, is it correct that you don't on a  
15 rotating basis offer each Board member the  
16 opportunity to offer a prayer to open the meeting?  
17 **A. I just offer it to the people who have**  
18 **indicated to me that they are willing to do it.**  
19 Q. Would it be fair for me to understand that  
20 the selection process is done in advance with the  
21 offer extended only to the, the invitation extended  
22 to Board members who have previously volunteered to  
23 participate in this process?  
24 **A. If the other Board members has not**

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1 **indicated to me that they are willing to do it then**  
2 **that would be true.**  
3 Q. And so as the facts stand now so far you  
4 extend the invitation only to the four Board members  
5 who have indicated their interest?  
6 **A. Yes.**  
7 Q. Do you think the full range of the Board  
8 views on this issue, that is the solemnization of  
9 the Board's meetings, the full range of those views  
10 could be more comprehensively presented by sticking  
11 with paragraph two of the policy and publicly  
12 offering on a rotating basis each individual Board  
13 member the opportunity to open the meeting with a  
14 prayer?  
15 **A. I thought about something like that, but I**  
16 **thought that I didn't want to put anyone on the spot**  
17 **by asking them to do it or for them to decline.**  
18 Q. Why do you think that it would put them on  
19 the spot to decline the opportunity?  
20 **A. I don't know that's just my personal**  
21 **reason, that's the reason that I don't ask them.**  
22 Q. All right I am asking you this question  
23 because I take it if someone had offered you the  
24 opportunity you would have decline it, correct?

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1 **A. I did originally.**  
2 Q. No, I mean if at the public Board meeting  
3 when you were not the president?  
4 **A. Oh, okay.**  
5 Q. If somebody had turned to you, someone who  
6 is not as considerate as you to ask you in advance,  
7 if they just turned to you and said Charlie, it's  
8 your turn, would you like to open the meeting with a  
9 prayer, would you have declined the invitation?  
10 **A. I don't know how what I would have done at**  
11 **the time, you know, if that occurred but I probably**  
12 **would have.**  
13 Q. Probably would have declined?  
14 **A. Yes.**  
15 Q. To the extent that you would have declined,  
16 would you have felt to some degree on the spot to  
17 use your words?  
18 **A. In all honesty I would.**  
19 Q. And it would have made you feel  
20 uncomfortable to decline the opportunity?  
21 **A. Yes.**  
22 Q. And the reason that it would have made you  
23 feel uncomfortable would be that you would have  
24 declined that invitation in public?

1 Q. And the reason -- in a private forum you  
2 would not consider stepping up and leading a group  
3 in prayer correct, it's not your way?  
4 **A. I just like to have the prayer prepared**  
5 **before I do it.**  
6 Q. I asked you some questions earlier about  
7 the cumulative impact of meeting after meeting  
8 prayers being offered in the name of Jesus Christ.  
9 Now I am to ask you about the cumulative impact of  
10 every person extended an invitation at the Board  
11 meetings offering a prayer or moment of silence.  
12 That cumulative impact is assured by your practice  
13 of extending the invitation only to people that you  
14 know will accept it, isn't that correct?  
15 MR. GOSSELIN: Objection.  
16 **A. I don't really look at it that way. I look**  
17 **at it that I gave them the opportunity to say one if**  
18 **they wanted to.**  
19 Q. Let me ask you this question, you do in  
20 fact extend the invitation only to those people that  
21 you know will accept it, isn't that correct?  
22 **A. At the present time, yes.**  
23 Q. And that's the way you have always done it?  
24 **A. Yes.**

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1 **A. It would not be that I am declining,**  
2 **because I would be concerned about what came out of**  
3 **my mouth when I said it, because I am the type of**  
4 **person that when I do this in public that I mean I**  
5 **have not done the Board meetings but in life given a**  
6 **prayer at other things that I write it before, you**  
7 **know, what I want to say.**  
8 Q. Sir, I may have misunderstand you. If the  
9 Board president said Charlie it's your turn would  
10 you like to open the Board meeting with prayer would  
11 you have accepted the invitation or declined the  
12 invitation?  
13 **A. I probably would have declined.**  
14 MR. ALLINGHAM: We have got to  
15 change the tape.  
16 MS. DUPHILY: Off the record at  
17 2:18 p.m..  
18 (WHEREUPON a brief recess was  
19 taken)  
20 MS. DUPHILY: back on the record  
21 at 2:19 p.m..  
22 Q. Would you have considered offering a prayer  
23 because you were in a public forum?  
24 **A. I could say that I would consider it.**

1 Q. When Mr. Walls was on the Board if you had  
2 extended an invitation to Mr. Walls you know that he  
3 would have declined that invitation, isn't that  
4 correct?  
5 **A. Based on the fact that I had asked him**  
6 **previous was he willing to do it and he declined,**  
7 **yes.**  
8 Q. Don't you think that the public is entitled  
9 to know that some School Board members think it's  
10 great to open School Board meeting with a prayer and  
11 some School Board members don't?  
12 **A. I've had people ask me why I don't do it.**  
13 Q. Don't you think that the public is entitled  
14 to see publicly that some Board members take up the  
15 invitation and some Board members decline the  
16 invitation?  
17 MR. GOSSELIN: Objection.  
18 **A. If they come to the Board meetings, you**  
19 **know, if people come to the Board meetings they are**  
20 **going to see that anyway, they are going to know.**  
21 Q. How are they going to know, sir?  
22 **A. By observance. They are going to see that**  
23 **there is only a select amount of people that choose**  
24 **to do this.**

46 (Pages 178 to 181)

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1 Q. Do you think people keep track of which  
2 Board member gave the prayer?  
3 **A. I don't know if the others struggle with**  
4 **doing it as much as I do, I don't know the answer.**  
5 Q. Well, it's your job and you keep a piece of  
6 paper, people don't keep in their minds --  
7 **A. I agree with that.**  
8 Q. Okay, so there is no way for people to know  
9 that on the current Board six of the ten Board  
10 members have indicated an unwillingness to offer a  
11 prayer?  
12 MR. GOSSELIN: Objection.  
13 **A. I'd like to say it was a personal**  
14 **preference.**  
15 Q. Indicated a personal preference not to have  
16 an invitation extended to them to offer a prayer?  
17 **A. Yes.**  
18 Q. There is no way for the public to know  
19 that?  
20 **A. I guess not.**  
21 Q. If you followed the policy as written, the  
22 public would know that, isn't that correct?  
23 MR. GOSSELIN: Objection.  
24 **A. If I called on someone that I knew that did**

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1 **not choose to do so and they said or they chose not**  
2 **to do it, then yes, they would, anyone who was there**  
3 **in attendance would know.**  
4 Q. And the reason you chose to figure out in  
5 advance who would accept your invitation is that you  
6 didn't want to embarrass the folks who didn't  
7 want, as a personal preference, to participate in  
8 that process, isn't that right?  
9 MR. GOSSELIN: Objection.  
10 **A. Yeah, embarrass them or put them on the**  
11 **spot, yeah, when I already knew the answer.**  
12 Q. Because you didn't want them to have to say  
13 in public I prefer not to lead the Board in prayer?  
14 MR. GOSSELIN: Objection.  
15 **A. Well, I guess yes.**  
16 Q. Why was the rotating basis incorporated in  
17 this policy, do you know?  
18 **A. Other than the fact that that was what came**  
19 **to us to be approved.**  
20 Q. From the Rutherford Institute?  
21 **A. Well, from the committee. I'm not sure who**  
22 **put that in there, whether the Rutherford Institute**  
23 **recommended it or whether our own people in this**  
24 **district did it Mr. Walls I'm not sure who did it.**

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1 Q. Did you ask where it came from?  
2 **A. No, I do not.**  
3 Q. Did you ask why it was included?  
4 **A. No.**  
5 Q. Did any Board member ask where it came  
6 from?  
7 **A. Not that I'm aware of.**  
8 Q. Did any Board member ask why it was  
9 included?  
10 **A. Not that I'm aware of.**  
11 Q. It was included for no reason, correct?  
12 You don't put in surplusage, or put in things that  
13 have no purpose?  
14 **A. True.**  
15 Q. So, it has a purpose but you don't know  
16 what it is?  
17 MR. GOSSELIN: Objection.  
18 **A. Yes.**  
19 Q. And you don't comply with it?  
20 MR. GOSSELIN: Objection.  
21 **A. I don't comply with it?**  
22 Q. You don't do what the policy says you  
23 should do?  
24 MR. GOSSELIN: Objection.

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1 **A. I guess in that respect probably not.**  
2 Q. Okay, I said at the outset that I would let  
3 you know when I am now on to matters that are  
4 Charlie Bireley specific and not 30(b)(6)  
5 designations, and we've now reached that point, and  
6 I have very little left to ask you as a matter of  
7 fact.  
8 **A. Okay.**  
9 Q. Do you recall giving an interview to Dan  
10 Gaffney on WGND in connection with the campaign for  
11 the School Board this spring?  
12 **A. Yes.**  
13 MR. ALLINGHAM: I'm going to mark  
14 as PX37 I hope I will. I'm not going to mark as PX37  
15 lacking copies a transcript.  
16 Q. I'm just going to ask you about what you  
17 said. Do you recall responding to question from Mr.  
18 Gaffney that an important reason why you rejected  
19 the settlement in February was that you wanted to  
20 fight the issue of School Board prayer?  
21 MR. GOSSELIN: Objection, don't  
22 answer that.  
23 Q. Instead of the transcript I'll mark as PX37  
24 a document bearing Bates numbers P559 through 560.

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1 I won't mark it, it's Exhibit 28. This is an  
2 article from The Wave, is that a paper that you read  
3 from time to time? Do you read The Wave from time  
4 to time?

5 **A. Yeah.**

6 Q. This is an article from Wednesday April 19,  
7 2006, and you're quoted as having made some  
8 statements to the reporter Laren Hughes. Have you  
9 given an interview, one or more interviews to Laren  
10 Hughes?

11 **A. Well, I've talked to her probably many  
12 times.**

13 Q. Near the bottom of the second page the  
14 article reports, "School Board members said they  
15 would have made the same decision three months ago  
16 even if they knew another lawsuit would follow."  
17 And then you are quoted, "It was the right thing to  
18 do," Bireley said. Until everyone in the community  
19 knows what we had to consider, nobody will  
20 understand it." Mr. Bireley, is that an accurate  
21 quote of what you said Miss Hughes?

22 MR. GOSSELIN: Objection, don't  
23 answer that. I'm instructing him not to  
24 answer any questions that relate to why the

1 perception that the public has misperceived the  
2 impact or interplay of the School Board Prayer  
3 Policy and the settlement that was proposed and  
4 rejected by the Board back in February?

5 MR. GOSSELIN: Objection, the same  
6 instruction.

7 Q. I'm handing you what was previously marked  
8 as Plaintiff's Exhibit 29. This is an article which  
9 includes a quote from you near the bottom of the  
10 page. The full paragraph reads, "In the meantime,  
11 Board members will continue to pray at the opening  
12 of their meetings and prayer will be permitted at  
13 commencement exercises if led by a student  
14 volunteer, said School Board President Charlie  
15 Bireley. This won't be easy but I'm pleased with  
16 the decision we have made, he said. We need  
17 finality." What did you mean when you told Miss  
18 Hughes, "We need to have finality?"

19 MR. GOSSELIN: Objection, don't  
20 answer that.

21 MR. ALLINGHAM: You can see who  
22 has the hard job here. Let's mark as PX37  
23 a document bearing Bates numbers P599 and  
24 600.

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1 Board made the decision it did to reject  
2 the settlement proposal that was presented  
3 to it back in February.

4 MR. ALLINGHAM: Quickly so you  
5 understand my position, the public's  
6 perception of the impact of the School  
7 Board Prayer Policy is I think a relevant  
8 consideration and the questions that I'm  
9 asking are meant to be leading questions  
10 for questions intended to elicit the  
11 witness' perception of what the public  
12 perceives to be the impact of the School  
13 Board Prayer Policy.

14 MR. GOSSELIN: I object to  
15 questions that elicit information  
16 concerning why Mr. Bireley or anybody else  
17 chose to accept or reject any previous  
18 settlement proposals that they have  
19 extended or have been extended to them.

20 MR. ALLINGHAM: Okay, are you  
21 going to instruct on that question, the one  
22 about is this an accurate quotation?

23 MR. GOSSELIN: Yeah, yeah.

24 Q. Okay. My next question is, do you have a

1 (WHEREUPON Plaintiff's Exhibit 37  
2 was marked for identification.)

3 Q. This is the text of an article from The  
4 Wave from January 4, 2006. On the second page  
5 you're quoted as saying in the fourth paragraph, "I  
6 would hope we wouldn't have to pay any money because  
7 we don't think we did anything that was wrong,  
8 Bireley said." Was that an accurate quote?

9 MR. GOSSELIN: Objection, don't  
10 answer that.

11 MR. ALLINGHAM: Damages are  
12 certainly relevant in the School Board  
13 prayer section of this litigation.

14 MR. GOSSELIN: Damages are  
15 relevant but this concerns the decision not  
16 to settle back in February, and that's what  
17 this is article --

18 MR. ALLINGHAM: I think  
19 without getting too detailed about that,  
20 that that's a statement that's impossible  
21 to be correct, because as everybody in the  
22 room knows the settlement contemplated the  
23 payment of money, and if Mr. Bireley was  
24 talking about the possibility that we don't

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1 have to pay any money then he is talking  
2 about something other than the settlement.  
3 I think I'm entitled to explore that.  
4 MR. GOSSELIN: I disagree. The  
5 issues here are the constitutionality of  
6 the Board prayer policy as written and as  
7 applied. This has nothing to do with that.  
8 This has to do with the process that led up  
9 to the Board meeting in February at which  
10 the Board voted not to accept the  
11 settlement proposal that was put forward.  
12 MR. ALLINGHAM: Don't you think  
13 that I'm entitled to test that with  
14 Mr. Bireley rather than from Mr. Gosselin.  
15 MR. GOSSELIN: Test what?  
16 MR. ALLINGHAM: What you just  
17 said.  
18 MR. GOSSELIN: This article, the  
19 first paragraph of the article is the  
20 Indian River School -- an article dated  
21 January 4, 2006 the Indian River School  
22 Board will consider paying a six figure  
23 settlement to end recent litigation over  
24 prayer at school functions. Regardless of

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1 whether that statement is correct  
2 concerning whether it's the Board's money,  
3 the district's money or the insurance  
4 company's money, the article concerns the  
5 settlement which Judge Farnan said is not  
6 within the realm of discoverable  
7 information in this phase of the litigation  
8 and presumably I think you will find that  
9 in the next phase as well. So, I'm  
10 instructing him not to answer.  
11 Q. Was the school Board Prayer Policy a  
12 critical issue in the election in the spring?  
13 A. Was it a critical issue?  
14 Q. Yes.  
15 A. I never made it if it was.  
16 MR. ALLINGHAM: Let me have 689.  
17 Let's mark as PX38 a document bearing Bates  
18 numbers P689 through 690.  
19 (WHEREUPON, Plaintiffs's Exhibit  
20 38 was marked for identification).  
21 Q. This is an article from the Coastal Point  
22 written by Jonathan Starkey shortly after the  
23 election. Have you seen this article before?  
24 A. Yes.

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1 Q. Is it correct that the turnout for the  
2 election for the district four seat in which you  
3 prevailed was a record turnout?  
4 A. Yes.  
5 Q. And was a major issue surrounding that  
6 election the prayer suit facing the district and the  
7 Board?  
8 A. In my personal opinion I don't think so, I  
9 ran on my record.  
10 Q. In the seventh paragraph Mr. Starkey  
11 reports that you said, "That the prayer suit facing  
12 the district and the Board was the major issue  
13 surrounding this year's election, and that it  
14 probably swung this year's vote." Did you tell  
15 Mr. Starkey that?  
16 A. I don't think so.  
17 Q. So, this is an inaccurate quote, inaccurate  
18 reporting of what you told him?  
19 A. I don't think that I said that in that  
20 particular -- on my point of view from where I came  
21 from, I did not make that this way. There might  
22 have been people in the community who did it,  
23 because Lord only knows what was going, but I did  
24 not make this an issue.

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1 Q. Oh, that's not what I said. I didn't say  
2 did you make it an issue, I said was it your view  
3 the prayer suit facing the district and the Board  
4 the major issue surrounding this year's election  
5 which probably swung this year's vote?  
6 A. I don't think I said that, not in the  
7 context like that.  
8 Q. Well, in what context did you say it?  
9 A. I agreed with him when he asked me the  
10 question, did I think it was an important thing  
11 because people in the community made it an important  
12 thing. I never did it, when I was campaigning or  
13 anything. No, I did not make this the issue.  
14 Q. Okay, so whether or not you made it the  
15 issue, it became the major issue in the campaign?  
16 A. I don't know that it became a major issue,  
17 it became an issue in the campaign.  
18 Q. Whether or not you made it an issue was it  
19 your view that it probably swung the vote?  
20 A. I have no way of knowing that.  
21 Q. Well, did you tell Mr. Bireley that you  
22 thought it probably swung the vote?  
23 MR. GOSSELIN: You mean Mr.  
24 Starkey.

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1 Q. Mr. Starkey, sorry.  
2 MR. GOSSELIN: Objection.  
3 **A. I don't think that I did.**  
4 Q. Three paragraphs below that Mr. Starkey  
5 quotes you directly, "That's the issue Bireley said  
6 of the District four campaign. They approved of  
7 what we did back on February 28th. It became a  
8 campaign issue." Is that an accurate quote of what  
9 you told Mr. Starkey?  
10 **A. Pretty much it did become a campaign issue.**  
11 Q. Just don't know whether it swung the vote?  
12 **A. I have no way of knowing --**  
13 Q. Did --  
14 MR. GOSSELIN: You interrupted  
15 him are you done?  
16 **A. I started to say that it didn't come from**  
17 **me, in anything that I ever wrote to anyone I never**  
18 **said that this was, you know, the major issue or**  
19 **whatever, that I can recall doing.**  
20 Q. Did you raise it as an issue in the  
21 campaign?  
22 **A. Did I raise it as an issue?**  
23 Q. Yes.  
24 **A. No, not me personally.**

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1 Q. If someone else raised the issue did you  
2 respond as to what your position was?  
3 **A. Yes.**  
4 Q. You did respond to questions from  
5 Mr. Gaffney during that campaign interview on the  
6 School Board prayer issue?  
7 **A. On the radio?**  
8 Q. Yes.  
9 **A. Yes.**  
10 MR. ALLINGHAM: Let's mark as PX39  
11 a document bearing Bates numbers P2640.  
12 (WHEREUPON Plaintiff's Exhibit 39  
13 was marked for identification.)  
14 Q. This is an article from the Sussex Post  
15 from the Thursday July 6, 2006 issue written by  
16 James Diehl. Did you give an interview to Mr. Diehl  
17 in connection with this article?  
18 **A. I'm not sure.**  
19 MR. GOSSELIN: I haven't read this  
20 article, can you give me a minute to read  
21 it myself because I may object to any  
22 questions relating to the article. I think  
23 I'm going to object to your substantive  
24 questions but I suppose I will wait until

1 you ask them.  
2 MR. ALLINGHAM: Good idea.  
3 Q. In the fourth column of the first portion  
4 of the article, the top portion of the article the  
5 second full paragraph incorporates a quote from you  
6 and it has a lead in paragraph which I also want to  
7 read. "Most provisions were made in response to  
8 recent court decisions according to Mr. Bireley. As  
9 long as a student is not coerced, then they're  
10 allowed to speak" I don't know what he was changing  
11 from.  
12 MR. GOSSELIN: Where are you  
13 reading from?  
14 MR. ALLINGHAM: It's the fourth  
15 column top of the page.  
16 MR. GOSSELIN: Okay.  
17 Q. "As long as a student is not coerced then  
18 they are allowed to speak Mr. Bireley said. We  
19 adopted this on our own." My question to you is  
20 what do you mean when you say we adopted this on our  
21 own?  
22 MR. GOSSELIN: Objection, don't  
23 answer that.  
24 Q. Is the antecedent, is what you are

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1 referring to with the words this, the policies on  
2 religion in the Indian River School District?  
3 MR. GOSSELIN: Objection, don't  
4 answer that.  
5 Q. Does this include the policy on School  
6 Board prayer in the Indian River District?  
7 MR. GOSSELIN: Objection, don't  
8 answer it.  
9 MR. ALLINGHAM: Wait a minute  
10 Jason, if this incorporates the School  
11 Board Prayer Policy then it's relevant and  
12 it's --  
13 MR. GOSSELIN: You know as  
14 well as I do what this refers to, it refers  
15 to the settlement proposal made by the  
16 Board to the Plaintiff, and you know what's  
17 in that.  
18 MR. ALLINGHAM: I don't  
19 believe that's true, but if it is true then  
20 the witness can tell me that.  
21 Q. The question is the this in that sentence  
22 are you intending to include the School Board Prayer  
23 Policy?  
24 MR. GOSSELIN: Objection, don't

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1 answer that.  
2 Q. Was the Board's consideration of the School  
3 Board Prayer Policy precipitated by Mrs. Dobrich's  
4 complaints which first came to the Board's attention  
5 in the spring or early summer of 2004?  
6 MR. GOSSELIN: Objection, don't  
7 answer it. Well, if you are asking him  
8 whether the changes to the policy that  
9 we've been talking, that this deposition is  
10 supposedly about, the Board Prayer Policy  
11 that was adopted back on October 19th, and  
12 whether that was related to precipitated by  
13 Mrs. Dobrich, I don't object to that  
14 question.  
15 MR. ALLINGHAM: Good position,  
16 that was my question, but whatever my  
17 question --  
18 MR. GOSSELIN: Well it didn't seem  
19 like --  
20 MR. ALLINGHAM: From now on I  
21 think what we should do is I will ask the  
22 question you can pose an objection. You  
23 can pose no speaking objection, but simply  
24 identify whether it's a privilege objection

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1 or a form objection and we can move on. I  
2 have been getting a lot of pressure about  
3 the timing of depositions, you've now  
4 switched witnesses in the order that you  
5 told me last night they would be given.  
6 That was after we had completed the  
7 deposition last night and I'm not going to  
8 waste my time listening to speaking  
9 objections. I'm going to pose my question,  
10 you can object, I will accept the objection  
11 or not and we will move forward.  
12 Q. My question to you Mr. Bireley --  
13 MR. GOSSELIN: If I don't  
14 understand your question and I try --  
15 MR. ALLINGHAM: I'm going to ask  
16 you not to use any more time, Mr. Gosselin,  
17 you know perfectly that your right in the  
18 deposition is simply to object if you  
19 have a form objection or to instruct the  
20 witness if you have a privilege problem.  
21 Other than your role as to sit there.  
22 Q. My question to you Mr. Bireley is this, the  
23 School Board Prayer Policy adopted on October 19,  
24 2004, was the board's consideration of that policy

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1 precipitated by Mrs. Dobrich's complaints to the  
2 Board which were received in late spring or early  
3 summer of 2004?  
4 A. Yes.  
5 Q. Would you characterize a policy adopted in  
6 response to complaints from a member of the district  
7 -- a resident of the district a policy that you  
8 adopted on your own?  
9 MR. GOSSELIN: Objection.  
10 A. No.  
11 Q. Did you give an interview to Lynn Parks for  
12 inclusion in an article in Delaware Beach Life?  
13 A. Yes.  
14 Q. If you will look at the last page of PX30,  
15 the second column from the right I have a question  
16 for you as a personal Board member. The Reverend  
17 Jerry Fike, is quoted as saying as follows: "My  
18 loyalty is to Jesus Christ foremost, even if that  
19 takes me to prison or to death. He is the predicted  
20 Messiah. He rose again and I believe that he knew  
21 what he was talking about, and if he is the Messiah  
22 then all religions are not equal, there are no  
23 alternatives to Christianity." Do you personally  
24 agree with the sentiments expressed by the Reverend

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1 Fike in that quotation?  
2 MR. GOSSELIN: Objection,  
3 don't answer that.  
4 MR. ALLINGHAM: The personal  
5 religious beliefs of the individual Board  
6 members who adopted the policy are plainly  
7 relevant under case law. Do you want to  
8 reconsider your instruction?  
9 MR. GOSSELIN: The judge told  
10 you -- I'm going to -- if you want me to  
11 tell you why I'm objecting or you don't.  
12 MR. ALLINGHAM: I just asked  
13 whether you would reconsider in light of  
14 what I just said.  
15 MR. GOSSELIN: No.  
16 Q. In the next paragraph of the article  
17 reports, "School Board members Bireley and Hattier  
18 rather than forcing what they think on other people,  
19 see themselves as defending the values of Sussex  
20 County. They see themselves as protecting what  
21 Hattier, who moved here in 1986, calls one of the  
22 last great communities with rural attitudes in the  
23 country."  
24 In adopting the School Board Prayer Policy

51 (Pages 198 to 201)

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1 did you consider yourself as defending the values of  
2 Sussex County?  
3 MR. GOSSELIN: Objection.  
4 Q. You may answer.  
5 **A. Not in this context, no.**  
6 Q. Did you see yourself as defending one of  
7 the last great communities with rural attitudes in  
8 this country?  
9 MR. GOSSELIN: Objection.  
10 **A. No.**  
11 Q. Did you speak to Dr. Hattier last night?  
12 **A. Yes.**  
13 Q. Did you discuss with him what he was asked  
14 during the deposition?  
15 **A. He made some statements to me, that's not**  
16 **the purpose of the call.**  
17 Q. What did he tell you about the deposition?  
18 **A. What did he tell me?**  
19 Q. Yes.  
20 **A. That, well, that I should be polite, that I**  
21 **should respect the other side, that I should do**  
22 **something that I made a boo boo already is wait for**  
23 **you to ask the complete question before I answer,**  
24 **things like that.**

1 **A. Yes.**  
2 Q. In PX30 which I put before you a few  
3 moments ago, Mr. Gosselin and I had an exchange  
4 about whether a question relating to your personal  
5 religious views was relevant. I understand that for  
6 reasons expressed by Mr. Gosselin that he is  
7 withdrawing his instruction to you not to answer  
8 that question, so let me repose it.  
9 In the Delaware Beach Life article marked  
10 PX30, the Reverend Jerry Fike, who by the way is the  
11 minister who offered the commencement prayers in  
12 2004, is that correct?  
13 **A. Yes.**  
14 Q. At the Board's invitation?  
15 **A. Yes, well, not at the Board's invitation.**  
16 Q. Who invited the Reverend Fike to deliver  
17 the commencement --  
18 MR. GOSSELIN: I object to that  
19 and instruct him not to answer, because we  
20 are getting off topic. You wanted his  
21 personal views.  
22 Q. Is it within the Board's responsibility to  
23 invite speakers to district events such as  
24 commencement exercises?

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1 Q. Did you visit the Harrison Senior Living  
2 Center in Georgetown, Delaware and Green Valley  
3 Terrace in Millsboro, Delaware as part of your  
4 re-election campaign for the School Board in 2006?  
5 **A. Did I?**  
6 Q. Yes.  
7 **A. No.**  
8 Q. Did anyone visit those centers on your  
9 behalf?  
10 **A. Not that I'm aware of.**  
11 MR. ALLINGHAM: All right let's go  
12 off the record for five minutes. I think  
13 I'm done but I want to check with my  
14 colleagues.  
15 MS. DUPHILY: We are going off the  
16 record at approximately 2:54 p.m..  
17 (WHEREUPON a brief recess was  
18 taken)  
19 MS. DUPHILY: Back on the record  
20 at approximately 2:58 p.m..  
21 Q. Do you believe that students in the  
22 district are impressionable because of their youth?  
23 **A. My personal opinion?**  
24 Q. Yes.

1 **A. No.**  
2 Q. The Reverend Fike is quoted as saying as  
3 follows: "My loyalty is to Jesus Christ, foremost,  
4 even if that takes me to prison or to death. He is  
5 the predicted messiah. He rose again and I believe  
6 that he knew what he was talking about. And if he  
7 is the Messiah then all religions are not equal.  
8 There are no alternatives to Christianity." Do you  
9 agree with the sentiments expressed by the Reverend  
10 Fike in that quotation?  
11 **A. No.**  
12 Q. One follow-up question, do you believe that  
13 all religions are equal?  
14 **A. That all religions are equal?**  
15 Q. Yes.  
16 **A. I believe that each individual group has a**  
17 **much right to have their own religion, as I have to**  
18 **have mine. Does that answer the question?**  
19 Q. Fair enough. And I take it then that you  
20 would say that there are alternative religions to  
21 Christianity?  
22 **A. Yes.**  
23 Q. And that those religions are of equal  
24 validity?

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1 **A. To the best of my knowledge because I don't**  
2 **know that I fully understand all of the religions.**  
3 Q. Okay. I asked you some questions before  
4 lunch about the responsibility of the Board to  
5 maintain order during, among other portions, the  
6 public comment section of the Board meetings, do you  
7 recall those questions?  
8 **A. Yes.**  
9 Q. During your tenure as Board president have  
10 you had occasion to turn off the mike or direct the  
11 speaker to leave the microphone during a public  
12 comment session?  
13 **A. Yes.**  
14 Q. Can you remember any specific examples?  
15 **A. Yes.**  
16 Q. What example can you recall?  
17 **A. It didn't have anything to do with the**  
18 **religious issue, it had something to do with an**  
19 **issue that you occurred during my campaign.**  
20 Q. I'm going to play a transcription -- I'm  
21 going to play a tape of that meeting, what I believe  
22 to be that meeting, and ask you to confirm whether  
23 this is a recording of you exercising your  
24 prerogative as the president to terminate a speaker

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1 during the public commentary portion of the meeting.  
2 (AT THIS POINT AN AUDIO RECORDING WAS PLAYED)  
3 Q. The voice saying Mr. Alling, Mr. Alling,  
4 that's your voice is that correct?  
5 **A. I think so, yes.**  
6 MR. ALLINGHAM: Pick it up again.  
7 (AT THIS POINT THE RECORDING WAS CONTINUED)  
8 Q. The voice that just said I suggest sir that  
9 if you preach yourself to be a Christian then I  
10 suggest that you act like a Christian. Do you know  
11 whose voice that was?  
12 **A. I think I do.**  
13 Q. Whose voice is it?  
14 **A. I think it's Mark Isaacs. I'm not**  
15 **positive, but I think that's who it was.**  
16 Q. Do you recall that portion of the public  
17 commentary at a School Board meeting on March 28,  
18 2006?  
19 **A. Oh, I recall it.**  
20 Q. And did you instruct Mr. Alling to leave  
21 the podium and cease speaking during the public  
22 commentary session?  
23 **A. Pretty much.**  
24 Q. Was that because he was speaking about what

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1 you considered to be personnel issues?  
2 **A. He was allowed to say whatever he wanted to**  
3 **say until he mentioned John Mitchell's name.**  
4 Q. And who is Mr. Mitchell?  
5 **A. He is the supervisor in charge of**  
6 **transportation for the school district.**  
7 Q. And did you think that up until the point  
8 that he mentioned Mr. Mitchell's name the commentary  
9 that Mr. Alling made was appropriate for public  
10 commentary during the meeting?  
11 **A. Probably so.**  
12 Q. Did someone suggest to Mr. Alling that when  
13 he mentioned Mr. Mitchell's name that that became a  
14 matter for executive session?  
15 **A. I tried to, yes, I did.**  
16 Q. During the portion of the tape we just  
17 heard?  
18 **A. Yes.**  
19 Q. All right, and when Mr. Alling left the  
20 podium did you thereafter tell him that you would be  
21 going into executive session and he could address  
22 the Board at that time?  
23 **A. No, not specifically. I don't know.**  
24 Q. Did you, do think having listened to that

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1 portion of the tape that it was appropriate to in  
2 effect cause Mr. Alling to cease speaking during the  
3 public comment session at that time?  
4 **A. Do I?**  
5 Q. Yes.  
6 **A. Yes.**  
7 Q. Okay. Now, at the, what I've characterized  
8 as the large meeting, the big meeting on August  
9 24th, we spoke generally about the commentary during  
10 the public comment period. I have a couple of  
11 preliminary questions. Is it correct that the time  
12 for each individual speaker was cut from three  
13 minutes to two minutes during that meeting?  
14 **A. I'm not sure. If I remember correctly the**  
15 **15 minute period was extended.**  
16 Q. Yes, the entire period was extended to 45  
17 minutes, do you recall that?  
18 **A. Yes.**  
19 Q. And do you also recall that because of the  
20 number of speakers the time was cut from three  
21 minutes to two minutes for individual speakers?  
22 **A. That's a possibility, yes.**  
23 Q. And did you understand that as a Board  
24 member because of the problems of the number of

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1 people who wanted to speak it was important to  
2 maintain those time limits?  
3 **A. You mean the difference between the two and**  
4 **the three minutes?**  
5 Q. Yeah.  
6 **A. I understand why it was cut because there**  
7 **were so many people who wanted to talk and we would**  
8 **have been there all night.**  
9 Q. You heard when you were speaking to  
10 Mr. Alling that, maybe it was you maybe it was  
11 someone else, spoke right up and said Mr. Alling  
12 your time is up?  
13 **A. That was someone else.**  
14 Q. Do you know who that was?  
15 **A. Mr. Savage.**  
16 Q. Is it Mr. Savage's responsibility to keep  
17 the time on the public comments?  
18 **A. Yes.**  
19 Q. All right, I want to show you a portion of  
20 the August 24th meeting, of the videotape of the  
21 August 24th meeting. But because of the exigencies  
22 of technology it will take me a minute to do that.  
23 In the meantime were you aware that the August 24th  
24 the Board meeting was videotaped?

1 **A. To the best of my knowledge it was.**  
2 Q. Have you ever heard anyone tell you that it  
3 was not audiotaped?  
4 **A. Not that I recall.**  
5 Q. Let me play a portion of the public  
6 commentary and then I have some questions for you.  
7 MR. ALLINGHAM: Before I do that,  
8 do you have some --  
9 MR. GOSSELIN: Question, is this  
10 being, I just want to ask the court  
11 reporter, are you taking down what is being  
12 said on this?  
13 Well, I am going to ask the court  
14 reporter, if you are unable to write down  
15 what is being said on this videotape that  
16 you just let us know.  
17 MR. ALLINGHAM: Well, before we do  
18 that, do you have some application if the  
19 court reporter is unable to write down  
20 what's said on the videotape?  
21 MR. GOSSELIN: Well, if he can't  
22 write down what's being said and you are  
23 asking Mr. Bireley to react to it we are  
24 not going to have a complete record because

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1 **A. Was I aware?**  
2 Q. Yeah.  
3 **A. Yes.**  
4 Q. At whose direction was it videotaped?  
5 **A. Lois Hobbs as far as I know.**  
6 **Superintendent Lois Hobbs.**  
7 Q. It was not the practice of the  
8 superintendent or the Board to videotape its  
9 meetings?  
10 **A. That is correct.**  
11 Q. Do you know why Mrs. Hobbs decided to  
12 videotape the August 24th meeting?  
13 **A. I can't answer that.**  
14 Q. Did you ever ask her?  
15 **A. No.**  
16 Q. It is the practice of the Board to  
17 audiotape all of its meetings, correct?  
18 **A. Yes.**  
19 Q. And the reason for that among other reasons  
20 is that it enables the secretary to be clear about  
21 what happened when she goes to write the minutes?  
22 **A. Yes, who says what, who does what, yes.**  
23 Q. Do you know whether the August 24th meeting  
24 was audiotaped?

1 he reacting to something on the record that  
2 isn't in the record.  
3 MR. ALLINGHAM: All right, I  
4 will mark as an exhibit the CD that  
5 contains, the DVD that contains this video  
6 at the conclusion of this line of  
7 questioning. We will also identify the  
8 time when this video is started playing  
9 and is finished playing, and I will ask and  
10 I can do this now, who it is that is the  
11 public speaker at the time so we have a  
12 cross check about what portion of the  
13 meeting we are showing Mr. Bireley.  
14 MR. GOSSELIN: Okay.  
15 MR. ALLINGHAM: All right, I think  
16 that will provide a record that can be  
17 reproduced for anyone who wants to see it  
18 of what it is that Mr. Bireley was watching  
19 when, prior to the time that I asked him  
20 questions.  
21 MR. GOSSELIN: That's fine, and  
22 I'm not saying that we wouldn't been able  
23 to do that otherwise, I just would like to  
24 know if it's not being taken down.

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1 MR. ALLINGHAM: Now, having said  
2 that, if the reporter wants the public  
3 statement that is being made on this tape,  
4 can take down what is being said, that  
5 would be helpful as well, but if you can't  
6 you can't. I think it's pretty clear  
7 actually, but we will see.  
8 Q. Before we start the video again, do you  
9 recognize the person who is standing to make a  
10 comment during the public comment session of the  
11 August 24 meeting?  
12 A. Yes.  
13 Q. Who is it?  
14 A. Harold Johnson.  
15 Q. Do you know who Mr. Johnson is?  
16 A. He used to be a School Board member.  
17 Q. Did he serve with you on the School Board?  
18 A. Yes.  
19 Q. For many years?  
20 A. Five, six, seven, eight, somewhere in that  
21 neighborhood.  
22 Q. Had you spoken to Mr. Johnson before the  
23 August 24th meeting about his intention to speak at  
24 the meeting?

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1 A. No.  
2 (AT THIS POINT A DVD WAS PLAYED)  
3 Q. Do you know how long Mr. Johnson spoke  
4 before someone mentioned to him that his time was  
5 up?  
6 A. No.  
7 Q. Do you know how much longer Mr. Johnson  
8 spoke after someone told him that his time was up?  
9 A. No.  
10 Q. Do you think how long Mr. Johnson spoke had  
11 anything to do with the substance of his remarks?  
12 MR. GOSSELIN: Objection.  
13 A. I really can't answer that.  
14 Q. Well, let me ask you this question did you  
15 understand the reference Madelyn Murray-O'Hare to be  
16 a threat against Mrs. Dobrich?  
17 A. I don't know that I thought that that was a  
18 threat. I'm familiar with Madelyn Murray-O'Hare, I  
19 mean I know the situation, who she was and all that,  
20 but I don't know that he was using that as a threat  
21 against her, I hope not.  
22 Q. What was the purpose of raising Madelyn  
23 Murray-O'Hare and her disappearance after raising  
24 School Board prayer issues if not to threaten Mrs.

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1 Dobrich?  
2 MR. GOSSELIN: Objection.  
3 Q. Do you have any idea what the purpose might  
4 have been?  
5 A. No.  
6 MR. GOSSELIN: Objection.  
7 Q. Did you think it was inappropriate for  
8 Mr. Johnson to raise the issue of Madelyn  
9 Murray-O'Hare in the charged atmosphere that you  
10 heard at that Board meeting?  
11 MR. GOSSELIN: Objection.  
12 A. It wouldn't have been something that I  
13 would have done.  
14 Q. If you had been the School Board president  
15 and you had heard that would you have banged your  
16 gavel and said I'm sorry, I'm sorry in order to  
17 maintain order at this meeting I'm going to have to  
18 ask you to leave the podium?  
19 MR. GOSSELIN: Objection.  
20 A. Would I?  
21 Q. Yes.  
22 A. Yes.  
23 Q. And that was the right thing to do, isn't  
24 it?

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1 MR. GOSSELIN: Objection.  
2 A. In my opinion it was.  
3 Q. Mr. Walls did not do that, did he?  
4 A. No, he did not.  
5 Q. Did any of the Board members stand up and  
6 say I'm not going to listen to this kind of  
7 commentary during our public comment session, it is  
8 not orderly, it is not courteous, it is not  
9 respectful and it is not the purpose of our public  
10 comment section of this meeting?  
11 MR. GOSSELIN: Objection, and I'm  
12 not instructing him not to answer, but I  
13 think you are getting close to harassing  
14 the witness. We just listened to what  
15 happened, now you are asking rhetorical  
16 questions about what was on the videotape  
17 and you are giving a speech. I mean, come  
18 on.  
19 MR. ALLINGHAM: Can he answer my  
20 question?  
21 MR. GOSSELIN: Can you state  
22 question again.  
23 Q. Every Board member has a right if they  
24 believe that public comment is not being conducted

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1 in an orderly, respectful and appropriate fashion to  
2 raise the issue with the chair of the meeting, do  
3 they not?

4 **A. They probably do but it's done in a  
5 different way.**

6 Q. Did it occur to you as a Board member to  
7 say to Mr. Johnson, look this is not what we have  
8 our public commentary for?

9 **A. No.**

10 Q. In retrospect do you think it should have  
11 occurred to you?

12 MR. GOSSELIN: Objection.

13 **A. I think that the president should have done  
14 that.**

15 Q. Did you hear the laughs of the crowd during  
16 the discussion of Madelyn Murray-O'Hare?

17 **A. Yes.**

18 Q. Does that sort of send a chill down your  
19 spine as you listen to it now?

20 MR. GOSSELIN: Objection.

21 **A. Well --**

22 MR. GOSSELIN: Go ahead.

23 **A. I really didn't agree with it the night  
24 that it happened, let alone after what I heard**

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1 today.

2 Q. But my question is a little different. Did  
3 the laughter that accompanied that statement send  
4 chills down your spine, either on August 24th or as  
5 you listened to it today on the videotape?

6 **A. I can't say it ran chills down my spine.  
7 It's something that I didn't approve of, didn't like  
8 that it happened, and to re-answer the same question  
9 you asked me before, if it had been me sitting there  
10 with the gavel I wouldn't have allowed it.**

11 Q. Would you agree with me that that laughter  
12 accompanying the Madelyn Murray-O'Hare statement is  
13 really disturbing?

14 MR. GOSSELIN: Objection.

15 **A. It's probably very disturbing to Mrs.  
16 Dobrich and her family who was there, I would say  
17 yes.**

18 Q. Is it disturbing to you?

19 **A. Yes.**

20 MR. ALLINGHAM: I have  
21 nothing further, thank you very much.

22 **A. You are welcome.**

23 MS. DUPHILY: The deposition  
24 is ending at approximately 3:20 p.m..

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REPLACE THIS PAGE WITH ERRATA SHEET

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CERTIFICATE OF REPORTER

I, David A. Sroka, Registered Professional  
Reporter and Notary Public, do hereby certify that  
there came before me on October 11, 2006, the  
deponent herein, CHARLES BIRELEY, who was duly sworn  
by me and thereafter examined by counsel for the  
respective parties; that the questions asked of said  
deponent and the answers given were taken down by me  
in Stenotype notes and thereafter transcribed by use  
of computer-aided transcription and computer printer  
under my direction.

I further certify that the foregoing is a  
true and correct transcript of the testimony given  
at said examination of said witness.

I further certify that reading and signing  
of the deposition were not waived by the deponent  
and counsel.

I further certify that I am not counsel,  
attorney, or relative of either party, or otherwise  
interested in the even of this suit.

\_\_\_\_\_  
David A. Sroka, RPR  
Certification No. 259-RPR  
(Expires January 31, 2008)

DATED: \_\_\_\_\_